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REPORTS OF CASES

ARGUED AND DETERMINED

IN THE

English Courts of Common Law.

WITH

TABLES OF THE CASES AND PRINCIPAL MATTERS.

HERETOFORE CONDENSED BY

THOMAS SERGEANT AND JOHN C. LOWBER, ESQs.,

Now Reprinted in Full.

VOL. XXII.

CONTAINING

CASES IN THE COURT OF KING'S BENCH IN 1826-7, 1831, AND 1832, IN THE
COURT OF COMMON PLEAS IN 1825, 1826, AND 1827, AND AT NISI
PRIUS IN THE COURTS OF KING'S BENCH, AND ON THE
CIRCUITS, FROM MICHAELMAS TERM, 1826, TO
TRINITY TERM, 1830, INCLUSIVE.

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1872.

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REPORTS OF CASES

ARGUED AND DETERMINED

IN

The Court of King's Bench,

WITH TABLES OF THE NAMES OF THE CASES AND THE
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BY

RICHARD VAUGHAN BARNEWALL, OF LINCOLN'S INN,

AND

JOHN LEYCESTER ADOLPHUS, OF THE INNER TEMPLE,

ESQES., BARRISTERS AT LAW.

VOL. II.

CONTAINING THE CASES OF EASTER, TRINITY, AND MICHAELMAS TERMS, IN
THE 1ST AND 2D YEARS OF WILLIAM IV. 1831-32.

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1872.

J U D G E S
OF THE
COURT OF KING'S BENCH,
DURING THE PERIOD OF THESE REPORTS.

CHARLES LORD TENTERDEN, C. J.
Sir JOSEPH LITTLEDALE, Knt.
Sir JAMES PARKE, Knt.
Sir WILLIAM ELIAS TAUNTON, Knt.
Sir JOHN PATTESON, Knt.

ATTORNEY-GENERAL
Sir THOMAS DENMAN, Knt.

SOLICITOR-GENERAL
Sir WILLIAM HORNE, Knt.

A

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CASES
ARGUED AND DETERMINED
IN THE
COURT OF KING'S BENCH,

Easter Term,

IN THE FIRST YEAR OF THE REIGN OF WILLIAM IV. 1831.

WM. BROADHURST v. ROBERT MORRIS.

Testator devised all his share of his two estates in W. to his daughter E. B. for life, and at her decease to J. B., her husband, during his life; and at the decease of his said son-in-law J. B. he directed that the whole legacy to him should go to his grandson W. B. and to his children lawfully begotten, for ever; but in default of such issue at his decease to the testator's grandson A. B., his heirs and assigns for ever: Held, that W. B. took an estate tail in the shares of the estates in W.

THE Master of the Rolls directed the following case to be stated for the opinion of the Judges of this Court:—

Ralph Brid oak being seised in his demesne as of fee of the lands and hereditaments, and undivided shares thereof, hereafter in his will mentioned, on the 29th of November, 1796, made and published his said last will in writing, duly executed and attested, and thereby, amongst other things, devised as follows:—
“My will and mind is, that my dear wife, Rebecca Brid oak, enjoy and take to herself, for her own use during her life, all my personal estate of what nature or kind soever; and at her decease to my grandson Alexander Brid oak, natural son
*2] of my daughter Rebecca *Brid oak, him and his heirs for ever. And I do further give and devise to my said wife all my real estate whatsoever and wheresoever for and during the term of her natural life, and from and after her decease I give and devise as follows: that is to say, I give to Alexander Brid oak, natural son of my daughter Rebecca Brid oak, all that my messuage or dwelling-house, with the lands and appurtenances thereunto belonging, situate and being in Bedford in the county of Lancaster; together with the half of my seat or pew in the parish church of Leigh, to him, his heirs and assigns for ever. I likewise give and devise to my said grandson Alexander Brid oak, my messuage, dwelling-house, or cottage, with the garden and croft thereunto belonging, situate in Roby, in the county of Lancaster, together with my seat or pew in the parish church of Hayton, to him, his heirs and assigns for ever. I give and devise to my daughter Ellen Broadhurst all my share of the two estates I have in Westhoughton-within-Brinsop, the same during her natural life, free from the control of her husband; and at her decease I give and devise the said estates to John Broadhurst, husband of my daughter Ellen Broadhurst, during his natural life, subject, never-

theless, to a legacy of 10*l*. which he shall pay yearly to his son William. And my will and mind is, that my said son-in-law shall not, at any time, sell, assign, or otherwise dispose of his interest in the land left him during his life, without my executor's leave; if he does, then, in such case, I do hereby revoke and make void this provision for his benefit, which shall then go to my grandson William Broadhurst. My will likewise is, that at the decease of my son-in-law John Broadhurst, the same, the whole legacy to him shall go to my grandson William *Broadhurst, and to his children lawfully begotten, for ever; but in default of such issue at his decease to my grandson Alexander Bridok, natural son of my daughter Rebecca Bridok, him, his heirs and assigns for ever." [*3]

The testator, Ralph Bridok, died soon after making his said will, without revoking or altering the same, leaving his said wife, the said John Broadhurst, the said Ellen Broadhurst, the said William Broadhurst the now plaintiff, and the said Alexander Bridok him surviving. Until the testator's death, and for some time afterwards, the plaintiff, William Broadhurst, had not been nor was married. After the death of the testator, the plaintiff entered into an agreement with the defendant, Robert Morris, for the sale to him of the shares in the hereditaments and premises situate at Westhoughton-within-Brinsop in the said will mentioned; which agreement the defendant refused to perform, alleging, that the plaintiff was entitled only to a life-estate in the premises under the will above stated. A bill was filed by the said William Broadhurst in the Court of Chancery, to compel a specific performance. The question for the opinion of this Court was,

What estate and interest the plaintiff William Broadhurst took under the will in the shares of the hereditaments and premises situate in Westhoughton-within-Brinsop? The case was argued in Michaelmas term.

Cowling, for the plaintiff. William Broadhurst took an estate tail. The question, whether he took such estate or one for life, depends on the construction of the sentence—"at the decease of my son-in-law John Broadhurst, the same, the whole legacy to him shall go to my grandson W. Broadhurst, and to his children lawfully *begotten, for ever; but in default of such issue at his decease to my grandson Alexander Bridok, natural son of my daughter Rebecca Bridok, him, his heirs and assigns for ever." If the devise stopped at the words "lawfully begotten, for ever," the case would be governed by the rule in Wilde's case, 6 Coke, 17 *b*, viz. that where lands are devised to a person and his children, and he has no children at the time of the devise, the parent takes an estate tail; "for the intent of the devisor is manifest and certain that his children (or issues) should take, and as immediate devisees they cannot take, because they are not in rerum natura; and by way of remainder they cannot take, for that was not his (the devisor's) intent, for the gift is immediate; therefore there such words shall be taken as words of limitation." The addition of the words "for ever" in this will can make no difference. The resolution in Wilde's case shows, that children means "heirs of the body," who may last for ever. This point was considered in Davie v. Stevens, Doug. 321. Again, if the words "in default of such issue," were unqualified by any subsequent ones, the case would be governed by Seale v. Barter, 2 B. & P. 485. That was a stronger case. The question there turned on the words of a codicil. By the will J. Seale would clearly have had an estate for life only, with a contingent remainder to his children in fee, according to priority of birth; and the great dispute there was, whether the codicil was intended only to give him a power of appointing which of his children should succeed him, or whether it gave him an estate tail: and the Court decided for the latter. But the case here depends on *the effect of the insertion of the words "at his decease." It will be said that they have given William Broadhurst a life-estate, with a contingent remainder to his children in fee, with an alternate contingent remainder to Alexander Bridok in fee. This would rest on the supposition that the words "in default of such issue at his decease" make one passage, and are to be read, in default of such issue living at his decease. But even admitting this, the con- [*4] [*5]

sequence will not follow. For, if we stop at the words "lawfully begotten, for ever," the general intent of the testator is clear that William Broadhurst take an estate tail; and in order to cut down this estate tail, it is absolutely necessary (as laid down by Lord Eldon, C., in *Jesson v. Wright*, 2 Bligh. P. C. 52), that a particular intent should be found to control and alter it, as clear as the general intent before expressed. There is no such intent here; the will may be satisfied by holding that William Broadhurst took an estate tail, with a contingent remainder to Alexander Bridgok in fee in case of William Broadhurst's death without issue then living. If for "the children," be written "heirs of the body," the case will be exactly the same as the devise to Elizabeth Malin, in *Ireson v. Pearman*, 3 B. & C. 799. The subsequent words rather raise an inference in favour of the plaintiff's construction. The cases show that, when it is doubtful what construction should be put on the word "children," the mere use of the word "issue" subsequently in the will raises an inference that "children" is not to be understood in its ordinary sense, but as issue, i. e. as "heirs of the body;" and it is immaterial whether the expression be "issue," or "such *6] *issue." *Wyld v. Lewis*, 1 Atk. 432, *Robinson v. Robinson*, 1 Burr. 38.

There are instances where the testator seems more to have had in view a contingent remainder than in the present case, and yet the Courts have given the parents an estate tail, *Oxford (University of) v. Clifton*, 1 Eden, C. C. 473, *Doe d. Cock v. Cooper*, 1 East, 229. It may be contended, that in those cases the word was "issue," not "*children*;" but the cases seem to go as far where the word "children" is used, *Hodges v. Middleton*, Dougl. 431; and Lord Hale, in *King v. Melling*, 1 Vent. 225, 231, appears to admit that children may be made nomen collectivum, though there be children at the time in esse. It seems to be settled that where a freehold is devised to a parent, and afterwards to children, it is immaterial whether the word used for his descendants be "children" or "issue." They are put on the same footing in the resolution in *Wild's case*, 6 Coke, 17 a, and in *Doe d. Smith v. Webber*, 1 B. & A. 713. Not only is there no evidence of intention in favour of the defendant's construction, but it would be contrary both to the particular and general intent of the testator. First, to the particular intent. For, wherever the testator in any other part of the will has given a life estate, he has expressly limited it for life; so, with respect to a remainder, he has always used words expressive of such estate; as, "at her decease," "from and after her decease," &c. So, of an estate in fee, he always says, "to him and his heirs for ever," and the like. This shows he did not intend

*7] *either W. Broadhurst to take a life estate, or his children a remainder; or if he had, that they should take a fee. This argument was much relied on by Lord Hale in *King v. Melling*, 1 Vent. 225, 231, and by Lord Kenyon, C. J., in *Doe d. Comberbach v. Perryn*, 3 T. R. 484. Secondly, such construction would be contrary to the general intent. If children be a word of purchase, then "such issue" means "such children," *Denn d. Briddon v. Page*, 11 East, 603 n; and the words should be read thus—"in default of such children living at his decease." So that those children only who survived William Broadhurst could share in the estate; and if any died in his lifetime leaving issue, their issue would be disinherited, and the estate would either go over to the surviving children, or if there were none, to Alexander Bridgok. This could not be the intention of the testator, for he clearly means to provide for the offspring of his two daughters, Rebecca and Ellen. He gives some estates for this purpose to Alexander Bridgok, son of Rebecca, in fee, and others to William Broadhurst, son of Ellen, by the clause in question. And he could never intend that estate to go over to Alexander Bridgok so long as there were any descendants of William Broadhurst. Such a consideration as this was thought material in *Wyld v. Lewis*, 1 Atk. 432, *Doe v. Perryn*, 3 T. R. 484, *King v. Burchall*, 4 T. R. 296 n. (d). *S. C.* 1 Eden, C. C. 424.

But, further, the words are not to be read as if they were in "default of such issue *living* at his decease," but a comma should be inserted at the word *issue*, and then the sentence reads thus, "in default of such issue, (then) at his decease

to," &c. According to this construction, the words "*at his decease*" are equivalent **to remainder*. Those words are frequently so used from a testator's not knowing the difference between a vesting in interest and in possession. In [*8 this will they are invariably used in that sense. Alexander Bridoak would then take a vested remainder in fee. The testator knew that according to the ordinary course of things, Alexander Bridoak's estate in remainder could not commence in possession until the death of William Broadhurst; and, therefore, he used that expression, dating, as it were, Alexander Bridoak's estate from the time of William Broadhurst's death, though in law it had been vested in interest before. This case will then be similar to *Walter v. Drew*, Comyns's Rep. 372, and also *Doe v. Cooper*, 1 East, 229, if the remainder there was a vested one, as seems to have been the opinion of the Court. No devise is to be found in the books in which there has been the expression "in default of issue at his decease." In all the cases the testator has either said "in default of issue living at his decease," or used some informal expression, which was generally construed to mean an indefinite failure of issue. The construction of the defendant is one which the Court will lean against; for contingent remainders are not favoured in the law. There is no case to be found in which there have been in one sentence words which in a will are sufficient to pass an estate tail, and that estate has been pared down by words in a subsequent and distinct sentence into an estate for life: the words which cause the "children, *i. e.* issue," to take contingent remainders, have always been inserted in the same sentence in which the estate has been limited to them, or in a prior one.

**Preston* for the defendant. William Broadhurst took an estate for life, remainder to his children as joint tenants in fee, with an alternate contin- [*9 gent remainder to Alexander Bridoak in fee, which would change into an executory devise on the birth of a child to William Broadhurst, and which was not barrable. The estate would vest in a child on its birth, subject to open and let in the other children as they came in esse. The question depends wholly on the intention of the testator. *Doe v. Burnsall*, 6 T. R. 30, is in point. There the devise was to M. Owstwick and the issue of her body as tenants in common; but in default of such issue, or being such, if they should all die under twenty-one, and without leaving issue, then over; and it was held that M. Owstwick took only an estate for life. That case was stronger than the present in favour of an estate tail, on account of the word "issue" being there used and not "children" as here; that they were to take as tenants in common and not as joint tenants was only one ingredient against the construction of an estate tail. Besides, here are words of inheritance which were wanting there. *Merest v. James*, 1 B. & B. 484, is also in favour of the defendant. In many cases the general intention would be defeated, unless all the issue should take, and that is the only reason for implying estates tail, *King v. Burchall*, 4 T. R. 296, n. (d). There is no such necessity here. According to the plaintiff's construction, the words "at his decease" should be considered as struck out. But those words cannot be so rejected. This case must be governed by *Doe v. Burnsall*, *Merest v. James*, and *Crump v. Norwood*, 7 Taunt. 362. In the last case the devise was to **three* nephews during their lives, and after their decease to the heirs of their bodies as tenants in common. It was not disputed that the [*10 nephews took an estate for life; and Gibbs, C. J., cited and relied on *Doe v. Burnsall*. The Court should lean against the construction contended for by the plaintiff: no man of sense would make such a devise, since the tenant in tail could bar it at any time by a recovery. In *Davie v. Stevens*, Doug. 321, there were limitations over on an indefinite failure of issue, and the case turned on that point. In *Seale v. Barter*, 2 B. & P. 485, the testator's intention was clearly to create an estate tail in the first taker, the parent, and the limitations over assisted such intention. In *Wyld v. Lewis*, 1 Atk. 432, the gift to the sons was only by implication, and the word "sons" was used collectively, and imported all issue male. Here there is an express gift to children, as children in the first degree with the words "for ever," under which they may take the

fee. *Hodges v. Middleton*, Dougl. 431, was expressly overruled in a case in Chancery, which has not been reported on this point, viz., *Charles Monck and Others v. The Commissioners of Woods and Forests*.

Cowling in reply. *Doe v. Perryn*, 3 T. R. 484, *King v. Burchall*, 4 T. R. 296, n. (d), S. C. 1 Eden, C. C. 424, and *Wyld v. Lewis*, 1 Atk. 482, show that the estate would not vest on the birth of a child, but only in such as should be living at the death of W. Broadhurst. The circumstance, that the children *11] would be joint tenants, is in favour of the plaintiff's construction, *for it is usual to give estates to purchasers as tenants in common, and not as joint tenants. (Per Lord Henley in *King v. Burchall*, 4 T. R. 296, n. (d), S. C. 1 Eden, C. C. 424.) The cases of *Doe v. Burnsall*, 6 T. R. 30, *Merest v. James*, 1 B. & B. 484, and *Crump v. Norwood*, 7 Taunt. 362, are consistent with the rule before stated as deduced from the cases; in all of them, the words which caused the children to take as purchasers were part of the same sentence by which the estate was given them. The cases in which "children," "issue," &c., have taken contingent remainders after estates of freehold given to their parents, are of two kinds; 1st, where a remainder is limited by express words, as in *Loddington v. Kime*, 1 Salk. 224; 2dly, where the testator has affixed some quality to the estate given to the issue, which is inconsistent with their taking by descent, as in *Doe v. Burnsall*, 6 T. R. 30, where they were to take as tenants in common. In this case, however, the words relied on by the defendant as paring down the estate tail are part, not of the sentence by which the estate tail is limited to them, but of a subsequent one; they come by way of proviso, not of exception. Besides, in *Doe v. Burnsall* it was unnecessary to decide whether M. Owstwick took an estate tail, or one for life; for in either case the recovery suffered had barred the contingent remainders over. As to *Crump v. Norwood*, 7 Taunt. 362, it may be doubted whether that case be not reversed by *Jesson v. Wright*, 2 Bligh, P. C. 1. *Cur. adv. vult.*

The following certificate was afterwards sent:

*12] "This case has been argued before us by counsel. *We have considered it, and are of opinion that the plaintiff W. Broadhurst took under the will of Ralph Bridgok an estate tail in the shares of hereditaments and premises situate in Westhoughton-within-Brinsop therein mentioned.

"TENTERDEN,
"J. PARKE,
"W. E. TAUNTON."

The KING v. STEWARD, MEALING, TURNER, and Others.(a)

The Court will grant a rule for a criminal information, on the sole testimony of a particeps criminis (uncontradicted), where the offence is against the public interests, as bribery in the election of an alderman, who will, by virtue of the office, be a justice of the peace.

A RULE nisi was obtained for a criminal information against the defendants for bribery in the election of an alderman of Norwich. The only material affidavit in support of the rule which remained uncontradicted on cause being shown, was that of William Lamb, who stated that Mealing had proposed to give him money to vote for the defendant Edward Steward, Esq., then a candidate for the office of Alderman; that the deponent agreed to do so for 5*l.*; that he voted for Steward, and that the defendant Turner immediately afterwards paid him 5*l.* for his vote. An Alderman of Norwich is, by the charter, a justice of peace for his own ward till he has borne the office of mayor, and afterwards for the city and its county.

The *Attorney-General* and *Kelly*, in showing cause, contended that the rule ought not to be made absolute on the sole testimony of Lamb, who, by his own

(a) This, and the following cases, as far as *The King v. Blake*, inclusive, were decided in Hilary term, but could not conveniently be brought within the first volume.

showing, *was a partaker in the offence, if such had been committed; and they relied upon *Rex v. Peach*, 1 Burr. 548, where an information was [*13 moved for against a party of cheats and gamblers, by some persons who turned out to be of the same description, for a conspiracy to cheat them at a foot-race, by inducing the racers to run booty: and the Court refused to give the complainants the extraordinary assistance of a criminal information "to attack their brethren in iniquity," who, as it was suspected, "had quarrelled with them about the division of their ill-gotten spoils."

Sir *James Scarlett* and *Austin*, *contrá*, maintained that the offence here charged differed widely from that alleged in *Rex v. Peach*, the complaint in this case being a matter of public concern.

Lord TENTERDEN, C. J. This case is very different from *Rex v. Peach*. There the matter charged was a private fraud, and all the parties interested stood in the same relation to each other with respect to the offence complained of. This is an offence against public policy, and concerns an office which, in addition to its other duties, involves those of a justice of peace. The distinction is very important. The rule, therefore, must be absolute as to those persons against whom Lamb's affidavit stands uncontradicted.

LITTLEDALE, TAUNTON, and PATTESON,, Js., concurred.

Rule absolute against Mealing and Turner.

***The KING v. The Company of Proprietors of the CHELMER [*14
and BLACKWATER Navigation.**

By an act for making a navigable communication between two places therein mentioned, a company was formed, and authorized to purchase lands, &c., for the use of the navigation, and to make and maintain the same. The act then directed that the company should be rated and charged to all parliamentary and parochial taxes, rates, and assessments for any lands to be purchased or taken, or warehouses or other buildings to be erected by them in pursuance of that act, in the same proportions as other lands and buildings adjoining to or lying near the same were or should be rated and charged:

Held, that the company were liable to be rated for their lands and buildings at the same value as other adjacent lands and buildings, and not according to the improved value derived from their being used for the purposes of the navigation.

UPON an appeal against a rate for the relief of the poor of the parish of Heybridge in the county of Essex, dated the 20th of May, 1830, whereby the company of proprietors of the Chelmer and Blackwater navigation were rated and assessed upon the annual rental of 800*l.* as occupiers of wharfs, granaries, dock, and land used for a navigation and towing-path, the court of quarter sessions amended the rate by reducing the sum of 800*l.* to 187*l.* 3*s.*, subject to the opinion of this Court on the following case:—

By an act of the 33 G. 3, c. 93, entitled, "An Act for making and maintaining a navigable communication between the town of Chelmsford, or some part of the parish of Springfield in the county of Essex, and a place called Collier's Reach in or near the river Blackwater in the said county," certain persons therein named and their several and respective successors, executors, administrators, or assigns were united into a company by the name of "The Company of Proprietors of the Chelmer and Blackwater Navigation," and were authorized to purchase lands, tenements, or hereditaments for the use of the said navigation, and for other the purposes mentioned in the act, and to make and maintain navigable and passable for boats, barges, and other vessels, the said *navigation through the several parishes therein mentioned. And in the same act it is provided "that the said navigation, or any works whatsoever [*15 to be made by virtue of the powers of this act, shall not be subject to the control, direction, survey, or order of any commissioners of sewers, or to any law or statute relating to sewers, anything herein contained, or any former law or

statute to the contrary notwithstanding. And the said company of proprietors shall and may from time to time hereafter be rated and charged to all parliamentary and parochial taxes, rates, and assessments, for or on account of any lands or grounds to be purchased or taken, or of any warehouses or other buildings to be erected by them in pursuance of this act, *in the same proportions as other lands, grounds, and buildings adjoining to or lying near the same are or shall be rated and charged.*"

In pursuance of the powers of this act, the company of proprietors made and completed the navigation before described, by deepening and cleansing, and in some places widening the channel of the river Blackwater, and by occasionally making cuts or deviations from the line of the river. These additional cuts, and the towing-paths along the whole line of navigation, were made upon lands purchased and held by the company under the powers of the act. It was admitted on the hearing of the appeal, that for these new cuts and the towing-paths, or the profits arising from them exclusively, and not for any profits arising from the old bed of the river, the appellants were rateable. In the parish of Heybridge the new cut leading to what is termed the sea-basin is something more than a mile and a half in length. In the other parishes through which the
 *16] navigation passes *the new cuts are of much less magnitude than in the parish of Heybridge, having been taken for the purpose of making locks and wears, the expenses of keeping up which are much greater than the profits accruing to the company in those respective parishes, from the land so taken, exclusive of the old bed of the river. If the company were to be rated for the new cuts, and for the wharfs and buildings occupied by them in the parish of Heybridge, according to the profits arising to them therefrom within the parish, the Court found the sum of 187*l.* 3*s.* ought to be the sum inserted in the rate instead of 800*l.* But if the company were to be rated for their new cut, wharfs, and buildings in the parish, without reference to navigation profits, in the same proportion as other lands, grounds, and buildings adjoining thereto in the parish of Heybridge, then the Court found that the sum of 35*l.* ought to be inserted in the rate instead of 800*l.*

The question for the opinion of the Court was, whether the appellants were exempt from any rateability in respect of the land taken and used by them for the purposes of the navigation as aforesaid, beyond the value of the adjoining land? If so, then the sum to be inserted in the rate was to be reduced 35*l.*; otherwise, to stand at 187*l.* 3*s.*

The case was argued in Hilary term by *Campbell* and *Knox* in support of the order of sessions, and *D. Pollock* and *Mirehouse*, *contrà*. The principal points of the argument are so fully commented on in the judgment of the Court, that no statement of them will be necessary here. *Cur. adv. vult.*

*17] *Lord TENTERDEN, C. J., in the same term delivered the judgment of the Court.

The question in this case is upon the meaning of the words, "in the same proportion as other lands, grounds, and buildings adjoining to, or being near the same, are or shall be rated or charged;" whether, in assessing the lands and buildings of the company, their value is to be estimated according to the value of other adjoining lands and buildings, or the assessment is to be made upon that proportion of the actual value (say three-fourths or four-fifths), upon which the other lands and buildings are assessed. I propose to consider the matter, first, without reference to any of the cases that bear upon the question; and, secondly, with reference to those cases.

The first thing that strikes the mind upon the latter construction of the act is, that it supposes the legislature to have contemplated, that property is not rated according to its actual value, but according to some part only of that value. In fact, this mode of rating is sometimes adopted; but I conceive the law generally assumes that all rateable property is to be rated according to its actual value. The statute of Elizabeth does not point to any other estimate. If all the property of the same kind in a parish is rated only upon some definite part of its

actual value, the effect is the same as if the rate were upon the entire actual value, and no occupier of such property has any ground of complaint. If, in making the assessment, the rent is first considered, and then the rate upon land is made on a certain part of the rent, and the rate upon houses on some greater part of, or the whole rent, which is "sometimes done," this is not properly a rating upon a part only of the value, but upon all the supposed real value; because, in estimating the value of land, it may be reasonable to make a greater deduction from the rent, than is made from the rent of houses, on account of the greater expense (of cultivation and repairs) in the case of lands than in the case of houses.

The act of parliament upon which the question arises, was passed for the purpose of making a river navigable. It was intended that this object could not be effectually accomplished without making, in some places, new cuts and channels deviating from the ancient course of the river, erecting locks or weirs in some places to overcome the inconvenience of natural falls and changes of level, and erecting buildings for the residence of lock-keepers or collectors of tolls, or for warehousing merchandise, and power & authority given to the company to purchase land for these purposes. It was well observed in the argument at the bar, that the ground taken for locks or weirs would be productive of no value in the hands of the company, there being no increase of land, but only a mileage toll. The company are not rateable in respect of the ancient course of the river, for the soil thereof is not vested in them, nor are they properly the occupiers thereof, but entitled only to the privilege of using it in the nature of an easement. No rate can be imposed upon mills or wharves, so that if there should happen to be in any parish a new cut or channel made, and any profitable building erected, but land should be bought for locks and weirs which are in themselves unprofitable, it might be contended that the company would not be rateable at all for the land taken, and the rateable property in the parish would be proportionately diminished, and the parish worse off than it was by the project undertaken. While in another parish where land should be taken for a new cut or channel, or the erection of a profitable building, the amount of the mileage toll for passing along such new cut or channel, or the profit of the building, might be greater than the value of the neighbouring land, or the profit of similar buildings, and in this instance the parish would gain by the project. Whereas, in the last case, and in all cases where the value of the adjoining land and similar buildings is not so great as the value of the new cut or building, but every parish will be in the same position as if the act had not passed, or nothing had been done. If the act of the company should prove unprofitable, as some persons have contended, it would be less than the value of the neighbouring land, and the parish would be less than it was by the diminution of the value of the land and buildings. And it is supposed the legislature to have intended that the value of the land and buildings should be taken according to the value of the land and buildings of the parish, and not according to the value of the land and buildings of the company.

It may be observed, also, that this is an affirmative enactment, and that the value shall be taken according to the value of the land and buildings of the parish, and not according to the value of the land and buildings of the company. [20]

It may be observed, also, that this is an affirmative enactment, and that the value shall be taken according to the value of the land and buildings of the parish, and not according to the value of the land and buildings of the company. It will be quite useless and ineffectual, because a rating upon a part only of the value, would be bad, being manifestly

to the decided cases. The first in order of time is the

case of the Leeds and Liverpool Canal Company, 5 East, 325. The acts of parliament upon which that case arose were passed, and the case came before the Court before it was established that navigation tolls are not rateable *eo nomine*; the decision does not furnish any authority on the present subject; but it seems probable that the case led the way to the rule against rating tolls, that was soon afterwards established.

The next case is the case of St. Mary, Leicester, 6 M. & S. 400, which came before the Court after it had been settled that tolls *per se* were not rateable. That arose upon an act passed in the same session of parliament as the act in question, and contains a similar clause as to rating, following also, as this does, the clause of exemption from the jurisdiction of the sewers. The sessions reduced the rate upon the company to the value of the lands and *buildings* belonging to the company, in proportion to the lands and buildings adjoining, exclusive of the tolls. This Court confirmed the order, being of opinion that *21] **tolls per se* were not rateable, and that there was no doubt, upon the construction of the act, that it had prescribed a special and definite mode of ascertaining the value of the land, which excluded the consideration of the tolls. It is true, that that act contained also a prior clause on the subject of rating, which might contribute to show the intention of the legislature; but it seems that either clause, if taken alone, must have received the same construction, as to land, which alone is mentioned in the first clause, warehouses and buildings being mentioned in the second only.

Next came the case of the Grand Junction Canal Company, 1 B. & A. 289. In that case there were two acts of parliament: the first contained a clause similar to the present, certainly not more favourable than the present, to the construction which prevailed. The clause in the latter act rather raised doubt and uncertainty: and was evidently less favourable to the construction adopted by the Court. It was argued there as here, that the word "proportion" meant *part* of the actual value; but the argument was repudiated by the Court, and the assessment allowed was upon the same principle as that proposed by the sessions in the present case, in reducing the rate to 35%.

The next case is that of St. Peter the Great, 5 B. & C. 475. That case arose upon two acts containing clauses similar to those in the two acts relating to the Grand Junction Canal; and the Court held, that the improved value of the land, by the receipt of tolls, could not be taken into consideration. The last case is that of King's Swinford, 7 B. & C. 236. There were several acts of parliament, *22] the **last* of which contained a clause like the present. But no question was made as to the construction or effect of that clause. The only question was, whether the company were rateable in King's Swinford, according to the value of the tolls earned in that parish, or upon that proportion of the tolls earned on the whole line which the length of the canal in that parish bore to the length of the whole line; and the Court very properly decided that the rate should be according to the amount of the earnings in the particular parish.

Upon this view of the cases, it appears that there is not any decision against the reduced rate proposed by the sessions in this case. And the two cases of the Grand Junction Canal and St. Peter the Great are plain authorities in favour of it, there being no substantial difference in the language of the statutes.

In this case, therefore, the rate must be reduced to 35%, that is, to the value of the land and buildings of the company, estimated according to the value of the adjoining lands and buildings, and not according to their actual productive value to the company.

Rate reduced accordingly.

actual value, the effect is the same as if the rate were upon the entire actual value, and no occupier of such property has any ground of complaint. If, in making the assessment, the rent is first considered, and then the rate upon land is made on a certain part of the rent, and the rate upon houses on some greater part of, or the whole rent, which is *sometimes done, this is not properly [*18 a rating upon a part only of the value, but upon all the supposed real value; because, in estimating the value of land, it may be reasonable to make a greater deduction from the rent, than is made from the rent of houses, on account of the greater expense (of cultivation and repairs) in the case of lands than in the case of houses.

The act of parliament upon which the question arises, was passed for the purpose of making a river navigable. It was foreseen that this object could not be effectually accomplished without making, in some places, new cuts and channels deviating from the ancient course of the river, erecting locks or wears in some places to overcome the inconvenience of natural falls and changes of level, and erecting buildings for the residence of lock-keepers or collectors of tolls, or for warehousing merchandise, and power is therefore given to the company to purchase land for these purposes. It was well observed in the argument at the bar, that the ground taken for locks or wears would be productive of no value in the hands of the company, there being no lockage dues, but only a mileage toll. The company are not rateable in respect of the ancient course of the river, for the soil thereof is not vested in them, nor are they properly the occupiers thereof, but entitled only to the privilege of using it in the nature of an easement. No rate can be imposed upon tolls *eo nomine*, so that if there should happen to be in any parish no new cut or channel made, nor any profitable building erected, but land should be bought for locks and wears which are in themselves unprofitable, it might be contended that the company would not be rateable at all for the land so taken, and *the rateable property in the parish would be pro [*19 tanto diminished, and the parish therefore would lose by the project authorized by the statute; while in another parish where land should be taken for a new cut or channel, or the erection of a profitable building, the amount of the mileage toll for passing along such new cut or channel, or the profit of the building, might be greater than the value of the neighbouring land, or the profit of similar buildings, and in this instance the parish would gain by the project. Whereas, if the land taken and buildings erected throughout the whole line are estimated and rated according to the value of the adjoining land and similar buildings, no parish will either lose or gain by the project, but every parish will be in the same situation as if the act had not passed, or nothing had been done under it. So, also, if the whole undertaking should prove unprofitable, as some projects of this kind have done, and the amount of the mileage toll, or receipts of the buildings erected, should be less than the value of the neighbouring land or of similar buildings, no parish would become a loser by the diminution of the value of rateable property within it, at whatever period of time such diminution might happen to take place. And if we suppose the legislature to have intended to prevent loss or gain to the parishes, and to leave all in the same state and condition as if no land were taken or building erected by virtue of the act, we must construe the words in question to mean, that the land and buildings of the company shall be estimated for the purpose of rates, according to the value of other lands and buildings adjoining or near: that the value shall be taken according to that rule, without regard to *any increase or diminution of [*20 actual value. And the words used may certainly very well admit of this sense and construction. It may be observed, also, that this is an affirmative clause of the act, intended to designate the rating; and if it mean only that the company shall be rated on the same part of the value of their property as the adjoining lands and buildings, it will be quite useless and ineffectual, because a rate on a different part, whether greater or less, would be bad, being manifestly unequal and unjust.

I come now to advert to the decided cases. The first in order of time is the

case of the Leeds and Liverpool Canal Company, 5 East, 325. The acts of parliament upon which that case arose were passed, and the case came before the Court before it was established that navigation tolls are not rateable *eo nomine*; the decision does not furnish any authority on the present subject; but it seems probable that the case led the way to the rule against rating tolls, that was soon afterwards established.

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Rate reduced accordingly.

*LLOYD v. ASHBY, H. R. ROWLAND, and SHAW. [*23]

A., R., and O. carried on business as partners, under the firm of Ashby and Co., from February 1820 to May 1824, when O. retired, and the other two partners agreed to liquidate all the debts due from the partnership; and they continued the business as partners, under the firm of Ashby and Rowland. In June 1824 S. agreed to become a member of this last-mentioned partnership, as from the 18th of May preceding, but his name was not to be introduced, and the business was still carried on under the names of Ashby and Rowland only.

In July 1824, H., being indebted to L., drew a bill of exchange in his favour upon Ashby and Co., which bill was accepted by the partner R. in the names of Ashby and Rowland. H., the drawer of the bill, had had dealings with the firm of A., R., and O.; but whether that firm was indebted to him when the bill was drawn did not appear, nor did it appear that there had been any dealings between H., the drawer, and A., R., and S., after the entrance of S. into the partnership. The name of S. was never used or made known to any person dealing with the firm: Held, that A., R., and S. were liable upon this bill as acceptors.

ASSUMPSIT by the plaintiff as payee against the defendants as acceptors of a bill of exchange for 82*l.* 12*s.* The defendant Rowland suffered judgment to go by default. The other defendants, Ashby and Shaw, pleaded the general issue. At the trial before Lord Tenterden, C. J., at the London sittings after Michaelmas term, 1825, the plaintiff was nonsuited, subject to the opinion of this Court on the following case:—

The plaintiff, an engineer and millwright, had made articles of machinery for Hugh Rowland, the father of the defendant H. R. Rowland, in or about July, 1824. The charge for these articles amounted, at reasonable prices, to 82*l.* 10*s.*; and, in payment of that sum, Hugh Rowland, a short time before the delivery of the goods, viz. on the 28th of July, 1824, drew, payable to the order of the plaintiff, and delivered to him, the bill of exchange in question, addressed to Messrs. Ashby and Co., London.

From February 1820, to May 1824, the defendants Ashby and Rowland, and one Richard Osborne, carried on the business of printers and engravers as partners, under the firm of Ashby and Co. In May 1824, *Osborne retired [*24 from the partnership, and the defendants Ashby and Rowland continued the business as partners, under the firm of Ashby and Rowland. By agreement between Ashby and Rowland and Osborne, the continuing partners were to liquidate all the debts due from the partnership. In June 1824, articles of agreement were executed between the defendants Ashby and Rowland and the defendant Shaw, under which Shaw advanced 1500*l.*, as a consideration to Ashby and Rowland, and became a partner in the concern as from the 18th of May preceding, being the day on which the former partnership was dissolved as to R. Osborne. By these articles it was provided, that the partnership should be carried on under the firm of Ashby and Rowland (the name of Shaw not being introduced), and that the personal attendance of Shaw should not be required except as he might be minded to attend. The business was accordingly continued in the names of Ashby and Rowland until September 1824, when the partnership was dissolved as far as regarded the defendant Rowland. The bill, after delivery thereof to the plaintiff, was accepted in the following form:—“Accepted, Ashby and Rowland, at Messrs. Veres, Ward, and Co.” The acceptance was in the handwriting of the defendant Rowland. The bill was presented when due, and payment was refused.

Hugh Rowland, the drawer of the bill, had dealings with the firm of Ashby, Osborne, and Rowland, by selling goods to them; but whether that partnership was indebted to him or not at the time when the bill was drawn, did not appear at the trial, nor did it appear that there had been any dealings between the drawer *of the bill and the partnership of the defendants subsequently. [*25 to the defendant Shaw's entrance into the partnership. Shaw went abroad immediately after the execution of the partnership deed, and did not return until the September following; and during that time his name was not used or made known to any person dealing with the partnership, or to the clerks of the partnership. It did not appear that the plaintiff, when he received the bill from

Hugh Rowland, had any knowledge of him, except that he had given the plaintiff the order for the goods; nor that the plaintiff, when he so received the bill, or at the time of its acceptance, had any knowledge of the firm of Ashby & Co., on which the same was drawn, or of the state of accounts between that firm and Hugh Rowland the father, or knew the name of any of the partners; but it was proved, that on receiving the bill, and before its acceptance, he directed an inquiry into the responsibility of the firm, and also sent to the house where the defendants carried on business to inquire whether they would accept the bill, and that the person he sent had a conversation with a person unknown to him (but who was not the defendant Rowland), in an inner room or counting-house in the house where the business was carried on, and informed that individual on what consideration the bill was drawn, and asked him whether it would be accepted, to which he answered that it would. The question for the opinion of this Court was, whether the plaintiff was entitled to maintain his action against the defendants for the amount of the acceptance.

This case was argued in last Michaelmas term by

*26] **Hutchinson* for the plaintiff. In the absence of fraud, the acceptance of one of several partners, in the name of the partnership, binds all. If the party accepting had no authority from the other partners to accept, and that be known to the person taking the bill, he is guilty of a fraud and cannot recover upon it. But that is not the case here. The want of authority is not to be inferred, even if the bill be taken not for value. And if it could, it is questionable whether, under the circumstances, a payee, taking without fraud or collusion, may not maintain an action. Here the payee took the bill for value, and did (what a prudent man would do) inquire whether the bill would be accepted. It may be said that the plaintiff did not know who the partners were, and, therefore, that it was not taken on the credit of Shaw. The bill here, however, having been drawn on Ashby & Co., and accepted by the firm in the name of Ashby and Rowland, by which Ashby, Rowland, and Shaw had agreed to go, it is the same thing in effect as if Shaw had been named in the acceptance. Shaw had given authority to the two to use those names as representing him. In *Vere v. Ashby*, 10 B. & C. 296, Bayley, J., lays it down as a general rule, "that where the partnership name is pledged, any person who either is an actual partner, or has allowed himself to be held out to others as a partner, is liable, unless the party to whom the partnership is pledged, is privy to an intent to misapply the money." Here the partnership name was pledged, and there was no evidence of an intention to misapply the money. In *Wells v. Masterman*, *27] 2 Esp. N. P. C. 731, Lord Kenyon *says, that a bill drawn on a partnership in their usual style and firm, accepted by one partner, binds the whole; except where it is put in force by a fraudulent drawer.

Scarlett, Attorney-General, *contra*. Hugh Rowland, the drawer of a bill, had transactions with the old firm of Ashby, Rowland, and Osborne, which was carried on under the names of Ashby and Co. The new firm was afterwards carried on under the firm of Ashby and Rowland, but the drawer of the bill had no transactions with the firm in which Shaw was a partner. The bill is here drawn on Ashby and Co. The drawer sold goods to Ashby, Rowland, and Osborne. It must be assumed, therefore, that it was drawn for a debt due to him from Ashby, Rowland, and Osborne. There was no evidence of any dealings between any of them and the drawer after Osborne had quitted or Shaw had joined the firm. He knew nothing of Shaw when he drew on Ashby and Co. If the drawer's son had accepted the bill in the name of Ashby and Co., there could have been no question. Suppose Hugh Rowland the father had said, I will give you a bill on the firm of Ashby and Co., of which my son is liquidating the debts, could it then be contended that the bill taken was that of any other firm? Shaw having desired his name not to be used, his liability depends entirely on his interest; for here his credit never has been pledged. The firm paying the debts of Ashby and Co., accepted the bill for a debt due from that firm. Shaw, a dormant partner in the house of Ashby and Rowland, was not a

party to that debt, and had no interest in the funds applicable to its payment. The debt was not *contracted during the time he was a partner. Wells v. Masterman, 2 Esp. N. P. C. 731, is rather in favour of the defendant. [*28 There it was held that a bill, though drawn on a partnership firm and accepted by one of the partners, if for a separate debt of one of them, shall not bind the firm, as to a party who knew the consideration of the bill. Applying that rule to the present case, here Hugh Rowland draws a bill on Ashby and Co., and it is accepted by Ashby and Rowland for a debt due from Ashby and Co. Ashby and Co. were at that time an existing company, for they had debts to pay. The giving of a bill to the plaintiff was an assignment of a debt due from Ashby and Co., not from Ashby and Rowland. The plaintiff knew the bill as one of Ashby and Co. If Rowland's son had told the father in terms that there was a new partner Shaw, the father could not have drawn it upon Shaw, whom he knew to have nothing to do with the debt he was about to assign to the plaintiff.

Hutchinson in reply. The argument on the other side assumes, that the bill was on account of a debt due from Ashby and Co. to the drawer. But that does not appear by the case. It is also assumed that the bill is drawn on the old firm. It is accepted in the name of Ashby and Rowland only. The old firm did not exist at the time when the bill was drawn. The acceptance was that which alone could have been given on any other bill, for Shaw's name was not to be used. Here Ashby and Rowland carrying on business under that name jointly with Shaw, have accepted a bill drawn on Ashby & Co. [*29 *They have thereby acknowledged that Ashby, Rowland, and Shaw are the persons intended by the drawer. *Cur. adv. vult.*

LORD TENTERDEN, C. J., in Hilary term, delivered the judgment of the Court.

We have considered this case, and are of opinion, upon the whole, that the plaintiff is entitled to recover. The bill was addressed to the firm of Ashby and Co., but was accepted in the name of Ashby and Rowland. The firm was in fact composed of Ashby, Rowland, and Shaw, but the names and style they had agreed to use were Ashby and Rowland. Shaw was interested in the house at the time of the acceptance. No fraud was found. A valid consideration was given for the bill. Notwithstanding the variance between the names to which the bill is addressed and those in which it is accepted, we are of opinion that the three defendants must be taken to be the persons designated by the acceptance in the name of Ashby and Rowland, and that the acceptance binds them all. That being so, there must be a new trial. .Rule absolute for a new trial.

***DOE dem. ROBERT GOLDIN v. THOMAS LAKEMAN and Others. [*30**

Testator devised estates to his son R. H., his heirs and assigns for ever, subject nevertheless to the payment of 250*l.*, 200*l.*, and 150*l.*, to the testator's three daughters respectively. He then continued, "And I do hereby direct, that until my said son Richard or his heirs shall come to England, and also to pay to my said three daughters the said sum of 600*l.* in manner as aforesaid, he shall not have possession of the said estate: but the rents and profits arising from the said estate and premises shall be equally divided to and amongst my said three daughters in equal parts and proportions, until my said son or his heirs shall come to England and pay the said sum of 600*l.* as aforesaid." He further empowered the eldest daughter to let the premises from time to time, for terms of seven years; and he added, "And in case my said son shall not come to England during his lifetime to take possession of the said estate in manner hereinbefore mentioned, and shall die without leaving any issue lawfully to be begotten, then I give and devise the said estate and premises to my said three daughters in equal parts and proportions, not as joint tenants but as tenants in common, and to the respective heirs of their several bodies for ever." If either of the younger daughters died under age and unmarried, her moneys, &c., were to be divided equally between the survivors.

On the testator's death the daughters entered, R. H. the son being abroad, and they kept possession till he died, never having made the required payment: Held, that their estate in the premises was either a fee, conditioned to determine when R. H. "or his heirs," should fulfil the terms of the will, or a chattel interest, subject to the same event.

EJECTMENT for messuages and lands situate in Aveton Gifford, in the county of Devon. At the trial before Littledale, J., at the Devon Spring assizes 1828, a verdict was found for the plaintiff, subject to the opinion of this Court upon the following case :—

Richard Hobbs being seised in fee of the premises in question, on the 3d of July, 1772, made his will, duly executed and attested, in which, after bequests of leasehold messuages, money, and chattels to his three daughters, whom he constituted also his residuary legatees, he devised as follows :—“I give and devise to my son Richard Hobbs, now of the island of St. Christopher’s, all that my messuage, estate, lands, and premises thereto belonging, called or commonly known by the name of South Efford, situate in the parish of Aveton Gifford, in the said county of Devon, now in the possession of George Steer, to hold the same premises to my said son Richard Hobbs, his heirs and assigns for ever, subject nevertheless to the payment of the sum of 600*l.* of lawful money of Great Britain to *31] my said three *daughters in manner following; that is to say, the sum of 150*l.* to my eldest daughter Elizabeth Hobbs; 250*l.* to my daughter Sarah; and 200*l.* to my daughter Ann. And I do hereby direct that until my said son Richard, or his heirs, shall come to England, and also to pay to my said three daughters the said sum of 600*l.* in manner as aforesaid, that he shall not have the possession of the said estate; but that the rents and profits arising from the said estate and premises shall be equally divided to and amongst my said three daughters in equal parts and proportions, until my said son or his heirs shall return to England, and pay the said sum of 600*l.* as aforesaid. And I do hereby direct that my said eldest daughter shall have power to let and set the said estate and tenement as often as the said estate shall come in hand, at a yearly improved rent, for any term of years not exceeding seven years; and in case my said son shall not come to England during his lifetime, to take possession of the said estate in manner hereinbefore mentioned, and shall die without leaving any issue lawfully to be begotten, then I do give and devise the said estate and premises to my said three daughters, in equal parts and proportions, not as joint tenants, but as tenants in common, and to the respective heirs of their several bodies for ever. And in case either of my said two daughters Sarah and Ann shall happen to die under age, and unmarried, I do direct that the moneys, estate, and effects of her so dying shall go to and be divided equally between the survivor of them and my said eldest daughter Elizabeth.”

Shortly after the execution of his will the testator died, leaving his said son and three daughters him surviving, his only children.

*32] *Richard Hobbs, the son of the testator, was in the West Indies at the time of his father’s death. He returned to England in the following year, and remained some months, during which time he resided with one of his sisters at Plymouth, but went over to the property in question, distant about sixteen miles, with the intention of taking possession, and entered upon it for that purpose. He subsequently visited it two or three times during his stay, and after executing certain articles of agreement (which were annexed to the case), returned to the island of St. Christopher, where he died in 1785, leaving no issue.

Elizabeth Hobbs, the testator’s eldest daughter, married Richard Smith, and died without issue in 1774. Sarah, the second daughter, attained her full age, and died unmarried in February 1828. Ann, the third, attained her full age, and married William Goldin, whom she survived, and died in 1824, leaving two sons, both of whom were born in the lifetime of Richard Hobbs, the son of the testator. One of them died unmarried in 1826; the other, Robert Goldin, was the lessor of the plaintiff.

The sum of 600*l.* directed by the will to be paid by Richard Hobbs in certain proportions to his three sisters was never paid by him, unless the articles of agreement above and hereafter mentioned could be deemed to operate as a payment.

After the return of Richard Hobbs to the West Indies, in 1773, a creditor of

his, at his instance, was allowed to receive the rents of the premises for a short time, until his debt was satisfied; but Richard Smith and Elizabeth his wife received them both before and after, until the death of the latter in 1774, subsequently to which time they were received by Sarah Hobbs, who also had the *custody of the title-deeds till 1787; and during this period the interest [33] upon a mortgage of the premises made by the said Richard Hobbs to one Susannah Mallett, for money lent by her to him, was paid out of such rents and profits. In 1785 a second mortgage of the premises was made by Richard Hobbs to one Richard Livermore, for money which he had lent to Hobbs. In 1787 Sarah Hobbs and her sister Ann Goldin, then a widow, executed a conveyance in fee of the premises to Christopher Savery, the two mortgagees being parties to the instrument; and the principal, and all interest due on the said mortgages, were discharged out of the purchase-money.

On the 22d of December, 1826, the lessor of the plaintiff made an entry on the premises with the knowledge of the defendants, for the purpose of avoiding all fines, if any such had been levied.

The agreement of 1773 before referred to was made between Richard Smith and Elizabeth his wife, the testator's eldest daughter, and Sarah Hobbs, his second daughter, of the first part; the two executors of the testator's will on behalf of Ann Hobbs, the third sister, who was an infant, of the second part; and Richard Hobbs, the testator's son, of the third part. By this instrument, after reciting that Richard had, in conformity to the will, come to England and taken possession of the estate, but had not paid the 600*l.* as the will directed, it was witnessed that Smith and his wife and Sarah Hobbs agreed and covenanted with the said Richard (the executors consenting and ratifying the agreement, as far as they lawfully might, on behalf of Ann Hobbs), that they would permit the said Richard to let the premises for any term or terms not exceeding seven years, *at the best rent that could be gotten, he making the rent payable [34] to Smith and his wife and Sarah Hobbs, who should discharge out of it first, the rates, taxes, and outgoings of the estate, and then the interest of the 600*l.* due to the sisters under the will, and should pay Richard Hobbs the residue; and should, on payment of the 600*l.* and interest, deliver up the premises again to Richard, with all the title-deeds and muniments. And Richard Hobbs agreed and covenanted to pay the 600*l.* at six months' notice, or, in default thereof, give up possession of the premises to Smith and his wife and Ann Hobbs, who should thereafter, and until such payment, receive the rents and profits to be applied as before mentioned. In the conveyance of 1787, Sarah Hobbs and Ann Goldin described themselves as the sisters and co-heiresses of Richard Hobbs (Sarah being also administratrix de bonis non of Smith, then deceased); and after reciting the before-mentioned agreement, and that Smith and his wife and Sarah Hobbs had, in pursuance thereof, successively kept possession of the premises and title-deeds, and received the rents and profits, and that the interest of the said 600*l.* had been paid, but the principal remained due, they did by those indentures for the considerations therein mentioned (among which was the paying off of Mallett's and Livermore's mortgages), grant, bargain, sell, &c., the said premises to Christopher Savery, his heirs and assigns for ever, discharged from the payment of the said 600*l.*, the receipt of which they acknowledged. In this conveyance was included the right of dower of Richard Hobbs's widow, which she had before conveyed in trust for Sarah and Ann for a valuable consideration.

This case was argued at the sittings in banc before *Michaelmas term, 1830; and it was then contended on behalf of the defendants, that the [35] agreement of 1773 operated, on Richard Hobbs's part, as a payment of the 600*l.*, and was recognised as such by the other parties; and that if the consent of the executors on behalf of Ann Hobbs (then an infant) was not a valid recognition by her, still she had ratified it by her execution of the conveyance of 1787, in the terms above stated. But supposing that there had not been a payment, or anything equivalent to it, then it was contended that the remainder had never

vested; for that, in default of payment of the 600*l.*, Richard took no estate, but a conditional fee or chattel interest passed to the sisters immediately by the devise of the rents and profits, and had never been divested again; and that if Richard had taken any estate in the first instance, that estate must have been a fee-simple, and the supposed remainder to the sisters was, in fact, an executory devise limited upon an indefinite failure of issue in Richard, and therefore void. The learned Judges were clearly of opinion that Ann Hobbs was not bound in the first instance by the instrument executed during her minority, whatever might be its operation; that if she took an estate tail at the death of Richard, her supposed ratification of the instrument after that event could not give it the effect contended for; and that the execution of this instrument by Richard, and the other acts done by him during his stay in England, could not in fact be considered as a coming to take possession in such manner as was directed by the will. But they desired that the other points of the case should be argued before the full Court. The case was further argued in Hilary term.

*36] **Praed* for the lessor of the plaintiff. The sisters of Richard Hobbs, under one of whom the lessor of the plaintiff claims, had an estate tail vested in them at the time of the conveyance to Savery; and, consequently, that conveyance was ineffectual. The operation of the devise, viewing it apart from the provision with respect to Richard's coming to England, is to give an estate tail to Richard, with remainder to his sisters in tail. It is true the testator, in the first instance, devises to Richard, and his heirs and assigns for ever; but this is qualified by the subsequent words, if he shall die "without leaving any issue lawfully to be begotten," which show an intention to restrain the term "heirs" to the heirs of his body; and therefore an estate tail only is created. The cases bearing on this subject are collected in 6 Cruise's Dig. tit. 38, c. 12, p. 250, &c., 3d ed. The charge of 600*l.* upon this estate does not enlarge it to a fee-simple; though in the case of a life-estate it would be otherwise. *Doe v. Fyldes*, Cowp. 833, *Denn v. Slater*, 5 T. R. 335, *Tenny v. Agar*, 12 East, 253, *Ragget v. Beattie*, 5 Bingh. 243. The testator's object clearly was to keep the estate in his family, restraining it, first to the son and his issue, and, secondly, to the daughters and theirs. But it was also his desire to enforce Richard's coming to England and paying the 600*l.*, by withholding the estate from him in the mean time. To accomplish this intention, he devised the rents and profits of the estate to be equally divided among his three daughters until Richard or his heirs should return to England and make the payment; and he empowered the eldest sister during that time to let the estate for terms of seven years. The words "until my son Richard or his heirs shall come to England," in *37] this part of the will, clearly mean heirs of the body; for otherwise the term heirs must apply to the sisters, who were already in England. The intention was not to give the estate itself to the daughters, but only to enable the eldest sister to receive the rents and profits as a trustee for them till Richard, or the heirs of his body, should return and pay the sisters their respective portions, or till Richard should die, leaving no such heirs. [PARKE, J. The sisters are to take equally under this devise, though the sums of money to be paid to them, when the son or his heirs return, are unequal.] It was said on the other side, that this devise of the rents and profits carried the land, and that it gave the daughters an estate of inheritance, determinable only when Richard or his heirs, indefinitely, should return and pay the 600*l.* It cannot be maintained against the case of *Price v. Vaughan*, Aleyn, 45 (which was cited in the former argument), that the land does not pass by a devise of the rents and profits; but it is not clear from that case that such devise will pass the estate of inheritance here contended for, or anything more than a chattel interest. This intermediate devise, if so considered, does not support the assumption that Richard was intended to take an estate, if any, in fee-simple, and that the ultimate limitation to the sisters was on an indefinite failure of issue. And any difficulty that might be raised as to the effect of this devise of the rents and profits, in case of the death of one or more of the sisters before payment of the 600*l.*, is removed, if

the will be read as giving the estate tail to the three *sisters immediately, and until Richard or his heirs return to England and pay; and the clause as to the rents and profits merely as the direction of the testator concerning the distribution of these, until such return and payment. "A particular estate may be transposed, and placed either before or after some other estate given by the will, if such transposition be necessary to fulfil the intent of the testator." 6 Cruise Dig. tit. 38, c. 9, p. 162. Green v. Hayman, 2 Cha. Ca. 10, Brownsword v. Edwards, 2 Ves. sen. 243. The general intent of the testator is to be carried into effect, notwithstanding any particular intention that may be inconsistent with it; Robinson v. Robinson, 1 Burr. 38; and that general intent will be consulted in the present case, if the devise be construed as giving the daughters an estate tail in the first instance, subject to be divested if Richard Hobbs, or the heirs of his body, should return to take possession on the terms of the will, with remainder over to the daughters in tail, if Richard, after so taking possession, should die without leaving heirs of his body.

Coleridge, contrd. The lessor of the plaintiff has no claim unless an estate tail has vested in the daughters of the testator; and that was not the effect of the will. There is nothing to show that the testator's intention was such as has been affirmed on the other side: his object appears to have been to give Richard the estate in fee, only securing to the daughters the payment of 600*l*. The limitation over to them in tail depends on two events: "In case my said son shall not come to England during his lifetime to take possession of the *said estate in manner hereinbefore mentioned, and shall die without leaving any issue lawfully to be begotten." Taking these two conditions together, and comparing them with the former part of the will, it is clear that the meaning of the first proviso is, in case Richard or his heirs should not come to England to take possession. The clause cannot be read as if the remainder were to depend upon one or the other of the two events there mentioned; for then it must be contended, that if Richard had died in the West Indies, leaving heirs, they might have been cut off from the estate, because Richard had not in person gone to England for the purpose specified; which evidently was not intended. To construe the clause in the alternative, the Court must be called upon to read "or" for "and;" and that to defeat the testator's intention: whereas in *Soulle v. Gerard*, Cro. Eliz. 525, and several other cases (collected in 6 Cruise's Dig., tit. 38, c. 9, p. 157, &c.), the Court has substituted "and" for "or," to prevent that intention from being frustrated. By the plain construction of this will, if Richard had taken any estate under it, he would have had an estate in fee; the alternate remainder, therefore, to the daughters could only be an executory devise: but as Richard, in fact, had not the estate in the first instance, and as the devise to him and his heirs would take effect only when he or such heirs, indefinitely, should come to England to take possession according to the will, that executory devise was void, as depending on an indefinite failure of issue, and that in a person who was as yet a stranger to the estate. The estate which the daughters took till their brother should comply with the will was not an estate *tail; and it has never been determined. That the devise of the rents and profits, gave them an estate in the land, is agreed: this, however, is said on the other side to have been merely a chattel interest, to secure the payment of the 600*l*. But no provision is made, in case one or more of the daughters die, for payment of their shares of that bequest. The estate is given to them till Richard or his heirs return, which is an indefinite period: and this last argument was relied upon in *Price v. Vaughan*, Aleyn, 45, as showing that the estate there in question was not a chattel interest. [Lord TENTERDEN, C. J. The words "until my son Richard or his heirs shall come to England," must refer to the heirs of his body; because, otherwise, the daughters, who actually were in England, are the heirs.] Still, the duration of the estate is uncertain, and the argument in *Price v. Vaughan* applies. A grant to the daughters and their heirs, until the events specified in the devise, would have given a base fee; but in a will, such an estate may pass without the word heirs, if the intention be clear. The daugh-

ters, therefore, in this case took a base fee until Richard or his heirs should come to England and pay the 600*l.* as directed by the will. That event had not happened when the conveyance was made to Savery. [Lord TENTERDEN, C. J. The estate, then, is still existing; and if so, it defeats the claim of the lessor of the plaintiff.] If it be only a chattel interest, the effect, as to him, is the same. To obviate this objection, it is said, that the estate tail limited to the daughters may be transposed, so as to take place of the first devise to them; but this has *41] only been done where it was plainly necessary for the *accomplishment of the testator's purpose; otherwise, the parts of the will must be read in the order given them by the testator.

The sisters, then, took by this devise an estate which has never yet been divested. If anything could have vested in Richard, it would, as already observed, have been a fee-simple. The devise to him in the first instance is clearly in fee; and the rest of the will, taken together, bears the same construction. The charge upon the land tends to show that this was the testator's meaning. It is true that where an estate tail is actually created, such a charge does not convert it into a fee; but where the question is, whether the estate be in tail or fee, a charge like this is to be considered, among other circumstances, as evidence of the testator's intention. In *Pells v. Brown*, Cro. Jac. 590, where the devise was to Thomas and his heirs for ever, with a limitation to his brother if Thomas died without issue, living his said brother, it was held that Thomas took in fee; and it was relied upon in support of this construction, that the devise was made to him, "paying to his brother Richard 20*l.*" And where the devise is in fee in the first instance, it makes no difference if, by a subsequent clause, a remainder over is limited on a particular event and the death of the first devisee without *heirs of his body*; such remainder amounting only to an executory devise, which cannot alter the nature of the preceding one. *Collenson v. Wright*, 1 Sid. 148, *Fearne on Contingent Remainders*, p. 507, 6th ed. In any view of this case, therefore, no estate tail has ever vested in the sisters of *42] Richard Hobbs; since the devise to them relied upon on *the other side was either limited on a fee, and void as depending on too remote a contingency; or was to take effect after an estate (whether base fee or chattel interest) which has never been determined.

Praed, in reply. In the clauses, if "my said son shall not come to England during his lifetime to take possession of the said estate in manner hereinbefore mentioned, and shall die without leaving any issue lawfully to be begotten," the latter words seem clearly referable to the time of Richard's death; and this contradicts the supposition of an indefinite failure of issue being contemplated.

Cur. adv. vult.

Lord TENTERDEN, C. J., in Hilary term, delivered the judgment of the Court. It is difficult to understand in this case what really was the testator's intention; and still more so to see how that intention can be carried into effect. But, on the best consideration we can give the subject, we are of opinion that the daughters took under this will either a fee-simple on condition,—namely, to determine when Richard Hobbs or his heirs should return to England and pay the sum of 600*l.* as directed,—or a chattel interest to continue till such return and payment. It is an established rule, that a devise of the rents and profits is a devise of the land: the daughters, therefore, clearly took an estate (of whichever description) under this will; and as the 600*l.* were not paid, their interest had never been divested at the time of the conveyance to Savery. The plaintiff, therefore, is not entitled to recover. Judgment for the defendants.

***The Dock Company at KINGSTON-UPON-HULL v. WILLIAM BROWNE and others.** [*43]

The port of Kingston-upon-Hull is mentioned in acts of parliament, charters, and other documents, in two senses; first, according to the popular understanding, as denoting a particular place; and secondly, in a larger acceptation, as comprising under one name a district of many places, classed together for the purposes of the revenue, and of which Kingston-upon-Hull is the chief.

The statute 14 G. 3, c. 56, s. 42, which gives the Hull Dock Company a tonnage on ships coming into or going out of the harbour of Kingston-upon-Hull, and the company's basin or docks within the port of Kingston-upon-Hull, *or unlading or lading any of their cargo within the said port*, must be construed as using the term "port" in the popular sense; and not, therefore, as extending the burden of dock duties to places which, in point of local description, are without the port of Hull; as Goole, on the river Ouse.

DEBT for tonnage duties in respect of ships and vessels of the defendants having laden and unladen goods within the port of Kingston-upon-Hull. Plea, nil debent.

At the trial before Bayley, J., at the Lent assizes for Yorkshire, 1829, a verdict was found for the plaintiffs, subject to the opinion of this Court upon the following case:—

The plaintiffs are the proprietors of extensive docks, basins, quays, and wharfs at the town and port of Kingston-upon-Hull; the defendants are the owners of a brig which sailed with goods, on the 14th of April, 1828, from Goole on a voyage to Hamburgh, and returned the following month with a cargo of wool and hides from Hamburgh to Goole. Goole is situated on the river Ouse, and is within and parcel of the duchy of Lancaster; and the undertakers of the Aire and Calder navigation have there recently made docks (being artificial excavations in the land adjacent to the river), and built quays, warehouses, and other conveniences suitable for carrying on a foreign trade. Kingston-upon-Hull is a town corporate, the mayor and corporation of which have jurisdiction over the town, and county of the same. It lies upon the river Humber, into which river, and considerably to the westward of the town, fall the two *rivers Ouse [*44] and Trent, the former passing from York to Selby, Rawcliffe, Howden, and Goole, in the order here mentioned; Goole being about twenty-five miles from Kingston-upon-Hull: the latter running from Stockwith and Gainsborough; and both losing at their confluence their respective names in that of Humber. On the south side of that river are situated the several towns or places of Barrow, Barton, Brigg, and Ferriby-Sluice, all above the town of Kingston-upon-Hull.

By an act of parliament, 14 G. 3, c. 56, for making and establishing public quays at Kingston-upon-Hull, &c., and for the benefit of commerce in the port of Kingston-upon-Hull, and for making divers works for the accommodation of vessels using the said port; after reciting an act of the 14 Car. 2 (which again recites an act made 1 Eliz., directing that no goods, &c., should be shipped or discharged but in or upon certain places therein described, except the port of Hull), by which act of Charles II. the king was enabled, by his commission, to appoint from time to time such places wherein it should be lawful so to ship and discharge goods, except the town of Hull, &c.; by reason of which exception, the present act (of 14 G. 3) was necessary for the purpose of establishing lawful quays at the port of Kingston-upon-Hull:—It was amongst other things enacted, that his majesty should assign necessary places and quays at Kingston-upon-Hull, and settle the extents and limits of the same, on which quays, &c., all goods brought by way of merchandise from any of the parts beyond the seas were to be landed. And for the purpose of reimbursing the company therein described for making and maintaining the basin, docks, and other works there mentioned, and enabling them to keep the said works in *repair, certain [*45] rates were to be paid by ships or vessels (with certain exceptions) coming into or going out of the harbour, and the said basin or docks within the port of Kingston-upon-Hull, or lading or unlading within the said port.(a) But it was

(a) The substance of section 42 is as follows: "That in consideration of the expenses incurred

enacted, that vessels coming coastwise from or to any place up the rivers Trent or Ouse, within the limits of the port of Hull as then used, should not be liable for the rates unless such vessels should come into or go out of the said basin or dock, or any part of the harbour called Hull Basin, or should lade or unlade within any part of the river Humber, or if such vessels should go into the said harbour solely for the purpose of custom-house clearance. It was also enacted, that regulations to be made in furtherance of the act should be published in the town of Kingston-upon-Hull; and that any two justices of the peace of Kingston-upon-Hull might issue a warrant for distraining for *penalties incurred

*46] under that act, with a power of appeal to the quarter sessions held for the town and county of the town. The rights of the Trinity House in and concerning the haven of the town of Kingston-upon-Hull were especially reserved; and the rights of the corporation to have the port called Sayer Creek, then called Hull, for ever annexed to the said town and liberties thereof. In pursuance of this act of parliament, a considerable part of the now existing docks, basins, quays, and conveniences were constructed.

By an act of parliament passed 42 G. 3, reciting that by reason of the increase of the trade and commerce of the port of Kingston-upon-Hull, the basin or dock and the harbour of Kingston-upon-Hull were not sufficient for the reception and accommodation of the vessels belonging to and using the said port, and that it was expedient, for the greater accommodation and benefit of the trade of the said port, that an additional basin or dock should be made at the said port in the manner thereafter described, the Dock Company were empowered to make such additional dock. By a subsequent act, passed 45 G. 3, reciting the former dock acts, it was enacted, that the same rights and privileges which belonged to the then present port of Kingston-upon-Hull should be extended to the docks and basins respectively, which to all intents and purposes should be deemed and held to be part of the port of Kingston-upon-Hull; and that vessels entering into and loading or unloading in the said docks or basins should be subject to the several regulations, and liable to the several duties, to which they were or would have been liable in the port of Kingston-upon-Hull.

*47] The port of Hull is mentioned in existing documents *of as early a period as the reign of King John. In the great roll of the pipe of the sixth year of that king, is an account of the fifteenths of the merchants for the sea-ports during a certain period: the fifteenths of Hull are there reckoned at 344*l.* 14*s.* 4½*d.* And there is also an account of the fifteenths of Scarborough, York, Selby, Barton, Grimsby, and other places. In the great roll of the pipe 9 Ed. 1 is an entry of the customs of wools, skins, and leather at the port of Hull for one year, amounting to 1086*l.* 10*s.* 8½*d.* In the roll 17 Ed. 1, is another entry of the customs of wool, fells, and hides in the port of Hull. The case further stated an inquisition and extent, in the 21 Ed. 1, of the town of Wike-upon-Hull, and of the lands, tenements, &c., thereto adjacent and belonging; and it then cited entries in the pipe roll 28 Ed. 1, of customs for wools, &c., returned by the collectors of the customs, for "The Port of Kingston-upon-Hull," and similar entries for "Kingston-upon-Hull," from the pipe roll 31 Ed. 1.

By the company about the basin, &c., there shall be payable and paid, from and after the 31st day of December, 1774, to the said company, or to their collectors or deputies for their use, for every ship or vessel (the King's ships of war, and other ships and vessels employed in his Majesty's service, only excepted), coming into or going out of the said harbour, basin, or docks, within the port of Kingston-upon-Hull; or unlading or putting on shore, or lading or taking on board, any of their cargo or any goods, wares, or merchandise, within the said port, by the master or commander, owner or owners of every such ship or vessel, the several rates or duties of tonnage hereafter described; that is to say, for every ship or vessel coming to or going between the port of Kingston-upon-Hull and any port to the northward of Yarmouth, &c., for every ton two pence. (And so as to other places.) Which rates or duties shall be and are vested in the Dock Company, and shall be paid at the vessel's entry inwards, or clearance or discharge outwards: or in case any ships or vessels shall not enter as aforesaid, then, at any time before such ships or vessels shall proceed from the said port, at the custom-house in the said port."

Section 44 is given at length in the judgment.

By letters patent 5 & 6 Ric. 2, the king granted to the mayor, bailiffs, and burgesses of the town of Kingston-upon-Hull, for the improvement of the same town, to have the port below the same town lately called Sayercryk, now called Hull, for ever annexed to the town aforesaid, and liberty of the same, from Sculcote as far as the middle course of the water of Humber, to build, &c., for the improvement, defence, preservation, and augmentation of the town aforesaid; and Edward the Fourth made a similar grant. Henry the Sixth, in consideration that the port of the town of Kingston-upon-Hull, by the daily course of the tides and of tempests, &c., was removed further from the town than it was accustomed to be, and was likely to be still further *removed, which would redound to the destruction of the said port, gave license to the mayor [*48 and commonalty, &c., to purchase lands and tenements held of the crown, whether in capite or otherwise, or held of other persons, to the value of 100*l.* a year, to have and hold to them and their successors for the defence, reparation, and security of the port.

By a commission in the exchequer of the seventh year of Queen Elizabeth, commissioners were directed to make certain inquiries touching the said port of Kingston-upon-Hull, and its member ports. One of the inquiries was: "What number of creeks do belong to the said port, and how far any of them is distant from the said port, and how far any of them be distant from other, and into what shores any of the said creeks do extend?" The answer first mentioned York, and then "certain creeks in Yorkshire belonging to the port of Kingston-upon-Hull that lie northward on the sea-coast from the mouth of Humber;" namely, Hornsaye, Bridlington, Flamborough, Fylay, and Scarborough; and on the south, Grimsby in Lincolnshire; of all which places the distance from Hull was stated by land and by water.

By another commission in the exchequer, 32 Ca. 2, in which his majesty recites, that "our members of the port of Hull," and the quays and wharfs in the said members, &c., have become unsettled, unbounded, and unlimited, and some of them formerly used are become inconvenient, and other places within the said port and members are now more commodious; commissioners are appointed to repair to the member ports of Hull, viz. Scarborough, Bridlington, and Grimsby, and to find out and assign and appoint open places there to be *places, quays, and wharfs for the landing and shipping of goods, and to settle the limits of the said member ports, and of all such places, quays, and wharfs, and to prohibit all other places within the said member ports from being used as such quays, &c. And the commissioners certified that they had settled the limits of the said member ports accordingly. [*49

By letters patent of 23 Eliz., a right (subsequently recognised by a charter of Charles 2) is confirmed to the corporation of the Trinity House at Hull, to levy from thenceforth for ever, at all times, within the port of the said town of Kingston-upon-Hull, and at all places within the limits and liberties thereof; that is to say, in all havens, creeks, and other places where the king's customer of Hull, by virtue of his office, had any authority to take any custom for primage as theretofore had been received or taken in the same port of Hull, in or by the way of lodenage or lowage, primage or stowage; that is to say, 3*d.* for every ton of wine, oil, fish, and all other goods which, in any ship or vessel by sea into the port aforesaid, or liberties thereof, as before said, should be brought and laid at shore, or otherwise discharged within the said limits; and likewise 3*d.* for primage upon every ton of goods shipped or laden in any ship at the said port of Hull, or at any place within the limits thereof, as before said, to be transported from thence by sea to any other place. The same letters patent also gave jurisdiction to the said corporation of the Trinity House at Hull in matters of dispute between masters and seamen belonging to Kingston-upon-Hull, or to any place within the said liberties or limits thereof.

The case then went on to state instances of duties *received by the Trinity House under this patent from 1566 to 1679, for goods exported and imported, chiefly in Selby vessels; and also of disputes heard and deter- [*50

mined by the same corporation between the masters and mariners of vessels belonging to Selby in 1593, 1624, and 1650; and it stated cases of the same kind to have occurred where the vessels belonged to Gainsborough and other places up the Ouse and Trent.

The statute 26 G. 3, c. 60, s. 19, required that all ships entitled to trade as British vessels should be registered in the ports to which they belonged, and that the name of such port should be painted on the stern of every such vessel. From the passing of that act till lately, all vessels belonging to Gainsborough, Selby, and other places up the Trent and Ouse, have been registered at the custom-house of Kingston-upon-Hull, and have had the words Port of Hull painted on their sterns.

There is not, nor has been, as far as can be ascertained, any custom-house at Gainsborough, Selby, or elsewhere on the Trent, Ouse, or Humber, except the custom-house of Hull; and vessels navigating those rivers have been cleared by the Hull custom-house officers, who have also superintended their registry.

The only instances of foreign trade with places on the Ouse above the town of Kingston-upon-Hull since the passing of the dock act of 14 G. 3, were cases of Dutch vessels coming for cargoes of lampreys, which were chiefly taken in between Goole and Selby. These vessels paid the Dock Company the dues given by the statute as on foreign voyages, though they never entered the harbour, basins, or docks, nor loaded or unloaded in the Humber. There was a similar statement respecting some vessels which sailed from Gainsborough for France

*51] *with corn in 1817, under a treasury order; and a Jersey vessel, which unloaded and loaded between Goole and Selby in 1809. It did not appear that any vessels loading or unloading at Scarborough, Bridlington, or Grimsby had paid dues to the Dock Company; such vessels do not clear at Hull: but such dues had been paid since (and, for anything that appeared, before) 1810 by vessels loading or unloading at Barrow, Barton, Brigg, and other places on the Humber, though they had not entered the harbour, basins, or docks within the port of Kingston-upon-Hull.

The officers of the customs stationed on the Humber, Trent, and Ouse have, before and since the act of 14 G. 3 (the first instance given was in 1771), been appointed by the board of customs in London, but have made their reports to the custom-house at Hull; and the seizures made by them have been there condemned and sold. An officer, when appointed, was sworn in as waiter, searcher, &c., at A. or B. in the port of Hull.

By the statute 6 G. 4, c. 107, s. 135, it is enacted, "That it shall be lawful for his majesty, by his commission out of the Court of Exchequer, from time to time to appoint any port, haven, or creek in the United Kingdom, or in the Isle of Man, and to set out the limits thereof, and to appoint the proper places within the same to be legal quays for the lading and unlading of goods: provided always, that all ports, havens, and creeks, and the respective limits thereof, and all legal quays appointed and set out and existing as such at the commencement of this act, under any law till then in force, shall continue to be such ports, havens, creeks, limits, and legal quays respectively as if the same had been appointed and set out under the authority of this act."

*52] *After the passing of that statute, and at the instance of the Aire and Calder Navigation Company, but without any previous writ or proceeding of ad quod damnum, a commission issued out of the Court of Exchequer, tested the 13th of December, 1827, directed to Charles Lutwidge, Esq., collector of the customs at the port of Hull, Thomas Rodnell, Esq., comptroller of the customs at the said port, and John Ker, Esq., purporting to appoint Goole to be a port in the United Kingdom for the import and export of goods, wares, and merchandises; and to assign the said C. L., T. R., and J. K. to be commissioners for setting out the limits of the said port, and for appointing proper places within the same to be legal quays for the lading and unlading of goods; and to give them full power and authority to repair to the said port of Goole, and to search, find out, and survey the same, and assign and appoint the extents, bounds, and

limits of the said port of Goole, and of such place or places to be quays or wharfs, &c., within the said port, and to appoint, limit, bound, and settle all those places by metes, limits, and bounds, and to set down and appoint the extent, bounds, and limits of the said port; and to certify their proceedings accordingly to the barons of his majesty's Court of Exchequer, in manner and at the time therein mentioned. On the 19th of January, 1828, the commissioners made their return to that commission, certifying that by virtue thereof they did, on the 11th of the same January, and at other days and times before the return of the commission, personally repair to the said port of Goole and survey the same, and under colour of the said commission they did assign and appoint certain bounds and limits of the said port of Goole, therein fully [*53] *particularized, and did assign and appoint a certain place, therein also described, to be thereafter a lawful quay or wharf for the lading and unlading, shipping and landing of goods within the said port of Goole; which commission and certificate were afterwards enrolled in the said Court of Exchequer; since which time there have been and still are a custom-house and custom-house officers and king's warehouses at Goole.

Upon this state of facts, the plaintiffs contended that Goole was within the limits of the port of Kingston-upon-Hull; and that the proceedings under the commission of the 13th of December, 1827, were insufficient to vary the plaintiffs' claim to dock duties.

Objections had been taken on behalf of the defendants to the admission in evidence of certain entries in the books of the Trinity House at Hull concerning the receipt of primage; and also of entries in the custom-house books as to the appointments of officers. The opinion of the Court was to be taken on these points, but it became unnecessary to determine them.

This case was argued in Hilary term, before Lord Tenterden, C. J., and Parke, Taunton, and Littledale, Js., by *Alexander* for the plaintiffs, and *Williams* for the defendants; but the most important parts of the subject were so fully gone into in the judgment, that a report of the argument will not be required. After time taken for consideration,

Lord TENTERDEN, C. J., in the same term, delivered the judgment of the Court.

This case depends upon the construction of the forty-second and forty-fourth sections of the act 14 G. 3, *c. 56, by which the company of the plaintiffs [*54] was established. And the question is, whether the words "port of Kingston-upon-Hull" are to be understood in the sense of locality, as denoting the particular place so named, or in a more enlarged and extensive sense, as comprising all the places and the whole district that, for some purposes of control, management, or superintendence, are within the limits of, and dependent upon or members of, a port whereof Kingston-upon-Hull is the head and chief.

It appears by the documents set forth in this case, and also by Lord Hale's treatise *De Portibus Maris*, that there were certain ports or places members of and dependent upon the port of Hull; Lord Hale mentions Scarborough, Bridlington, Grimsby, and York. By the commission issued in the seventh year of Queen Elizabeth, as abstracted in this case, it should seem that there were sixteen member ports of Hull, which must mean members of the port of Hull; and in answer to the inquiry, what number of creeks belong to the said port, the return mentions York, Hornsaye, Bridlington, Flamborough, Fylay, Scarborough, and Grimsby. The commission issued in the 32 Car. 2, speaks of our members of the port of Hull, and authorizes the commissioners to repair to *our* said member ports of Hull, to wit, Scarborough, Bridlington, and Grimsby, and to set out places, quays, and wharfs for landing and shipping of goods (which are commonly called legal quays), and to settle the extents, bounds, and limits of the said member ports. It is observable, that in this commission the king speaks of the member ports as being *his* member ports, that is, as in some sense belonging to him, whereas the port of Kingston-upon-Hull, in the limited sense of *that word, did not belong to the king, having, as appears by this [*55]

case been long before granted to the corporation of that town. The word "creeks" used in this commission evidently means, not creeks of the sea, but creeks of ports; that is, members of or dependent upon some other port.(a)

Although it is evident that there were members of the port of Hull, yet it may be difficult to say at what time any of the places became such members. There is certainly no document set forth in this case, nor anything to be found in Lord Hale's treatise, to show that they are of greater antiquity than the document set forth at length, p. 146 of the treatise, which the learned writer mentions as a *statute* of the 3 Edw. 1,(b) and which he considers as a parliamentary grant of the customs upon wool, skins, and leather exported, against the opinion of some writers, who have spoken of them as existing by prescription. He considers this document also as being the institution of the two officers afterwards called the collector and comptroller of the customs, and of the seal to the writing now called a cocket, denoting the payment of the duties, and of the place where the customs ought to be paid; this statute providing for one in every county, which power the kings afterwards enlarged by appointing a seal to be kept at more than one port in a county.

It appears by the case that there is not nor ever was, so far as the same is ascertainable, any custom-house at any place on the Trent, Ouse, or Humber, except at Hull only; and consequently all ships requiring a clearance, sailing *56] to or from any place on those rivers—and *probably at the date of the commission in the time of Charles II., from Scarborough and Bridlington also,—must have obtained their clearance from the officers stationed at Hull; though there would be, for convenience, inferior officers, such as tide-waiters and searchers, stationed at other places, and acting in subordination to the officers at Hull; and it is stated in the case that there were such at some places.

From all this it appears, that the port of Hull was, for the purpose of revenue, the head or chief of a very extensive district. And this also accounts for the registering of ships at Hull belonging actually not to Hull, but to other places within that district.

By the charter of the corporation of the Trinity house at Hull, referred to in the case, the corporation is to have certain payments in respect of goods brought by sea into and landed at, or shipped from, "the port of the said town of Kingston-upon-Hull, and all places within the limits and liberties thereof; that is to say, all havens, creeks, and other places where the king's customer of Hull, by virtue of his office, had any authority to take any custom by the name of *primage*;" and jurisdiction is given to the corporation in matters of dispute between masters and mariners belonging to Kingston-upon-Hull, or to any place within the said limits or liberties thereof. And it appears that this jurisdiction has been exercised in some instances at Selby, a place higher up the river than Goole. I understand some question has been lately raised as to the jurisdiction of this corporation, and therefore I shall make one observation only upon this part of the evidence; namely, that the port of the town of Kingston-upon-Hull is here evidently distinguished from places within the limits and liberties of that *57] port, *and that those places are so mentioned with reference to the king's customer, and denoted by the authority exercised by the customer as to taking *primage*. The earliest document in the case wherein Hull is mentioned as a port is the extract from the pipe roll in the sixth of King John, of the account of merchants of the seaports; and in this account Scarborough, York, Selby, and Grimsby are separately mentioned, and without any reference to or dependence upon Hull.

In the extract from the Pipe Rolls of the 9th, 17th, 28th, and 31st Ed. 1, which are accounts of the receipt of customs of wool, skins, and leathers, a very large sum is set down as having been received on this head in the port of Hull. As neither Scarborough, York, Selby, Grimsby, nor any other place that appears at any time to have been considered as member of the port of Hull,

(a) See Hale de Portibus Maris, p. 47.

(b) It is not printed in the statutes of the realm.

is mentioned in the case as being returned in the accounts, I take it for granted that none of those places are named; and the omission will be perfectly consistent with the fact of an establishment of the King's officers of his customs at Hull, after the statute of the 3d Ed. 1, and may be accounted for in that manner, though it is hardly to be supposed that none of those customable articles were shipped at Scarborough or Grimsby, where it appears that merchants were established as early as the reign of King John. It is not necessary to the decision of this case to inquire, either at what period Hull first became a port, or at what time the port was granted to the corporation; probably the port of the river Hull existed as a port before the conquest, as Beverly appears to have done (Hale, p. 67); and it may be doubtful whether the port of Hull was granted to the corporation before the charter of Richard II., *though, in [58 the dispute with the Archbishop of York, as to his claims in relation to Beverly, of which Hale gives an account (p. 67, &c.), the corporation claim the port under a grant of the town and borough in the 5th of Ed. 3. It may be observed, however, as a matter of curiosity or history, that the name Kingston-upon-Hull appears for the first time in the pipe roll of the 28 Ed. 1; which agrees with the inquisition in the 21st year of that reign quoted in the case, and with Lord Hale's account, p. 68, of that king's exchange with the Abbot of Meaux, whereby he acquired the vill of Wyk, and then improved Sayer Creek, and also with the mention of Sayer Creek in the charter of Richard II. and Edward IV., as being the ancient name of the port.

The conclusion to be drawn from all these documents is, that the enlarged sense of the term port of Hull, or port of Kingston-upon-Hull, is to be taken with reference only to the royal revenue and the establishment of the officers of the customs for the collection and security of that revenue, as arising in an extensive district and various places whereof the port of Hull was the head and chief.

There being then two distinct senses in which the phrase, the port of Hull, is used, namely, one as the head port of a district wherein there were subordinate and dependent ports; and the other the limited (and this also the popular) sense, of a port situate locally on a certain river or part of a river with a town near thereto,—we are to inquire and determine in which of these two senses the phrase or name is used with regard to the rates in question in this cause.

These rates are a tax upon the subject; and it is a sound general rule, that a tax shall not be considered to *be imposed (or at least not for the benefit [59 of a subject) without a plain declaration of the intent of the legislature to impose it. And it is not to be expected, generally, that a tax or burthen will be imposed upon persons who do not in any degree participate in the benefits of the measure which the tax was intended to remunerate. There may be special and particular circumstances which may make it fit for the legislature to do this, but it is not to be expected or presumed generally.

The rate in question is imposed as a remuneration for the expense of excavating and making a new dock or basin for the reception of ships at Kingston-upon-Hull. All vessels that resort to that place derive benefit from this measure; even those that do not enter the new basin or dock, but land or receive their goods at other wharfs in the haven, are benefited by it, by reason of the greater space that is left for their accommodation by the removal of other vessels into the dock or basin. Vessels that do not enter the haven, but land or take their goods at other places, derive no benefit. It appears indeed, by the case, that some vessels of the latter description have paid the rates; but the act of parliament on which this question arises, is much too recent to receive exposition from usage; the instances are not very numerous; and even if we suppose them to be all that could give rise to the demand before the establishment of the port of Goole, they may not unreasonably be referred to the unwillingness of a private individual to enter into an expensive contest with a corporation, and will go a very little way toward the construction of the act.

Upon looking at the act itself, at its title, and at the greater part of its enact-

*60] ments, it will be found that they *relate properly to the town and haven of Kingston-upon-Hull, and to measures and works to be adopted and carried on at that place. By the forty-second section of the act, the duty or rate is imposed "upon every ship or vessel (except the king's ships, or ships in his employment) coming into or going out of the *said* harbour, basin, or docks within the port of Kingston-upon-Hull, or unlading or putting on shore, or lading or taking on board, any of their cargo within the *said* port." In the enumeration of the rates, which are varied according to the ship's voyage, the first article is "for every ship or vessel coming to or going between the port of Kingston-upon-Hull" and some other ports therein designated. All the following articles are upon vessels coming to or going between, as expressed in some, or trading between, as expressed in others, the *said* port of Kingston-upon-Hull and some other port or place designated in the particular article.

Now it appears impossible to say that the second member of the sentence of general enactment as to vessels unlading or lading within *the said port*, can be understood in any different or more enlarged sense than the prior member of the same sentence, to which it so manifestly refers, and which mentions vessels coming in or going out of the *said* harbour, basin, or docks within the port of Kingston-upon-Hull; and the articles specifying the particular rates must be understood in the same manner.

And if we refer to the title and all the precedent parts of the act for the interpretation of this forty-second section, as the word of reference *the said* requires us to do, we shall certainly find nothing to give a more extensive sense to the name or phrase **"the port of Kingston-upon-Hull,"* than its local and *61] popular sense, and much wherein it is evidently limited to that sense.

The forty-fourth section of the act, however, has been relied upon, and very properly so for the purpose of the argument on the behalf of the plaintiffs, as showing that the name "Port of Kingston-upon-Hull" must be understood in its more enlarged and extensive sense. This section relates to vessels employed in the coasting trade. It is in form a proviso, and ought perhaps, in strict propriety, to be considered as an exception from the preceding section; and, therefore, as showing the sense of the words used in that section. The answer given to this in the argument at the bar was, that this section should be considered as introduced only *pro majori cautela*, for the satisfaction of persons engaged in the coasting trade, and the exclusion of questions that might otherwise arise in respect of their vessels.

The words of this section are, "That this act shall not extend to charge any ship or vessel with the rates or duties aforesaid which shall come or go coastwise from or to any port or place in Great Britain, to or from any place up the rivers Trent or Ouse within the limits of the port of Hull, as now used, or to or from any other place up the *said* rivers or any other river which falls into the *said* rivers or either of them, or which shall trade between any such port or place in Great Britain and any such place as aforesaid within or up the *said* rivers or either of them, unless such ship or vessel shall come into or go out of the *said* basin or dock, or any part of the *said* harbour or haven called Hull haven, or shall use the *said* basin or dock or quays within the *said* harbour, or shall unlade *62] or put on shore, or lade or take on board, any goods, &c., or any part of *the cargo of such ship or vessel within any part of the river Humber; or to charge with the *said* rates or duties, or any part thereof, any such coasting ship or vessel which shall go into, or by the officers of the customs be called into the *said* harbour or haven for the sole purpose of being entered or cleared at the custom-house there."

It may be observed that this section does not mention *the port of Hull*, like the former sections, but *the limits of the port of Hull*, and that a part of it relates to the unlading or lading goods in any part of the river Humber. This latter part may have been intended to prevent frauds upon the revenue of the Dock Company by the discharge or receipt of goods in the river Humber by means of barges or lighters conveying them to or from Hull; and the former

part plainly indicates a distinction between the port of Hull and the *limits of the port of Hull*; and the meaning of the words *limits of the port of Hull* is explained by the charter of the corporation of the Trinity House at Hull, wherein the words "limits and liberties" are used to denote the places whereat the king's customer of Hull had authority to take any custom by the name of primage.

It appears, therefore, upon consideration of the whole matter, that this forty-fourth section ought to be considered as introduced by way of caution, and to prevent doubts and questions, rather than as explanatory of or enlarging the sense in which the words "port of Kingston-upon-Hull" are to be understood in the forty-second section.

In the argument at the bar on behalf of the defendants, reference was made to the fifty-eighth section of the 42 G. 3, c. xci., and the sixth section of the 45 G. 3, *c. xlii., two acts passed for enabling the Dock Company to make additional docks or basins; and it is manifest that the name "port of Kingston-upon-Hull" is there used in the limited sense of locality, and as designating that port as a port on the river Hull, according to the popular meaning and acceptance of that word, which is in general the meaning of words used in an act of parliament not relating to matters of science, whether of law or any other science, or to matters of art on any particular subject of practical performance. Upon the whole matter, therefore, we are of opinion that the plaintiffs have failed in establishing a claim to the rates in question. This is the opinion of all of us who heard the argument. If there be any error in the particular course of reasoning adopted, or in any particular observation before made, that error is to be attributed to me alone. [*63]

Judgment for the defendants.

The KING v. ROBERTS and Others.

An information removed from the late court of session at Chester, pursuant to 1 W. 4, c. 3, s. 4, may be proceeded upon in the Court of King's Bench, though no recognisances have been entered into for prosecuting with effect, &c., as required in the case of informations in K. B. by 4 & 5 W. & M. c. 18, s. 2.

In a case of quo warranto informations so removed, and on which subpoenas had issued before the removal, and been disobeyed, the Court here refused to grant attachments, but recommended fresh subpoenas.

By the statute 11 G. 4 and 1 W. 4, c. 70, s. 14, the jurisdiction of his majesty's court of session of the county palatine of Chester, and of certain other courts, was abolished; and by the statute 1 W. 4, c. 3, s. 4, it is enacted, that all informations in the nature of quo warranto, and pleas and proceedings thereon, depending in any of the said abolished courts, shall, at the request either of the relator or defendant, be transmitted by the late *prothonotary of such court, or other officer or person having the custody thereof, into the crown office of his majesty's Court of King's Bench, and be proceeded with and heard and determined in the said Court of King's Bench as if the same had been there commenced. In pursuance of this enactment, five quo warranto informations were returned by the late prothonotary and clerk of the crown of the Chester court of session into the crown office of the King's Bench. It appeared from the proceedings returned that the informations had been filed in the court at Chester in the summer of 1829, and that subpoenas had issued in all. The defendants not appearing, attachments had issued against two of them from the Court at Chester; but no appearance had been entered in any of the cases. [*64]

John Jervis moved, in Hilary term, for renewed attachments in the two cases above mentioned, and for original ones in the rest; and he stated that the officers of the crown office in the King's bench had declined to act, because no recognisance had been entered into pursuant to the statute 4 & 5 W. & M. c. 18, s. 2,

and also on account of the length of time elapsed since the subpoenas had been issued. He contended that the first objection did not apply, inasmuch as the provisions of 4 & 5 W. & M. c. 18, s. 2, were, by the sixth section of the same act, expressly confined to informations exhibited by the master of the crown office in the Court of King's Bench; and that in the case of an information already depending in one of the abolished courts, the act of 1 W. 4, c. 3, merely substituted the King's Bench for such court, for the purpose of proceeding in and determining the cause.

*65] *Lord TENTERDEN, C. J. If these attachments were granted, it would be for disobedience to the subpoenas, and we should be issuing attachments out of this Court for neglecting the subpoena of another. The best course will be to take out new subpoenas from the Crown Office here. I think recognisances are not necessary. The new act makes no provision for them. The statute 4 & 5 W. & M. is confined to informations exhibited in the King's Bench; and the recognisances are to be entered into before the information is filed. They could not, therefore, have been required originally in the present case, and cannot now be insisted on.

The rest of the Court concurred.

The KING v. The Inhabitants of SEDGLEY.

The express mention in the statute 43 Eliz. c. 2, s. 1, of coal-mines is a virtual exclusion of all other mines, and consequently other mines are not rateable to the relief of the poor.

Whether an excavation in the earth, from which limestone is obtained, be a mine or not, is a question of fact. But where the sessions found that the limestone was obtained and raised by sinking shafts perpendicularly down to the stratum, which lay forty or fifty yards below the surface of the ground, and that the stratum was worked by roads and gateheads, and the stone raised to the surface by machinery, or carried under ground to a tunnel (which is the mode used in obtaining coal and ironstone), the Court held, that the property was a limestone mine, and therefore not rateable to the relief of the poor.

By a rate for the relief of the poor of the parish of Sedgley, in the county of Stafford, made the 12th of May, 1829, the Earl of Dudley was rated as the occupier and proprietor of land and lime works at 4*l.* 13*s.* 4*d.*, being on an annual value of 1000*l.* Against this rate he appealed, on the ground that he was overrated in respect of the yearly value of the lime works and land by him occupied in the parish; and also, that under the denomination of lime works *66] were included certain mines of limestone, for which he was *not liable by law to be rated. The Court of quarter sessions quashed the rate, subject to the opinion of this Court on the following case:—

The appellant is the owner and occupier of lands in the respondent parish of Sedgley, containing certain strata of limestone, and also of the works hereinafter mentioned, by and out of which the limestone is raised. The strata of limestone under these lands lie in a sloping position, and one stratum distinct and a considerable distance from the other, in the same manner as coal, ironstone, &c. The strata frequently crop out or terminate at the surface, and deepen in the opposite direction. Those parts of the strata which cropped out or terminated at the surface, were worked by the appellant and his predecessors in quarries by daylight, or open work, following the course of the strata as far as was practicable. The continuations of these strata, which were in the course of being worked at the time the rate was made, lie forty or fifty yards below the surface of the ground, and are worked in large excavations by means of pit-shafts, steam-engines, &c., in the same way as coal, ironstone, and other minerals, and no part of the limestone is now gotten in quarries or by open work. The produce is in part drawn up the pit-shafts, and in part sent off by an under-ground canal or tunnel.

The only difference between these, which the appellant contends are limestone mines, and which are described in the rate as lime works, and coal and ironstone

mines, is the position of the strata, the material gotten out, and the greater excavations in the former than in the latter. The only way into these mines or works is down the shafts, or through the tunnel, which is wholly underground, a great part of it being upwards *of fifty yards below the surface of the ground, the deepest part being at its junction with that part where the lime- [*67] stone is gotten. The limestone is gotten in large excavations made in the direction in which the strata run ; which excavations communicate by headways or gateroads with the bottom of the shafts, and the works are lighted by candles or lamps, no part being open to daylight. The working requires experience, and is carried on by persons who are brought up to the occupation, and are called limestone miners or limestone getters, as often one as the other. The limestone is conveyed along railroads, from the part of the works where it is gotten, through the gateroads ; one part to the bottom of the pit-shafts, and the other part to the canal or tunnel. That which is taken to the bottom of the pit-shafts is drawn up by the steam-engines, and the other part is sent off in boats along the tunnel. By far the greater portion of the limestone gotten by the appellant is sold in its raw state to the iron-founders for smelting iron ; but a small portion (which, by agreement, is taken at a hundredth part of the whole) is burnt into lime by the appellant on his own land. There is no difficulty in finding the limestone, the pits being sunk, engines erected, and levels and tunnels made, and the mines or works opened and in operation. The profits of the appellant are certain, though subject to variations in consequence of frequent breakings off of the strata, and their being thrown into different directions : these increase the difficulty and expense of working, and render fresh openings necessary. Limestone strata were lately found and worked in an adjoining parish to Sedgley, at a depth of more than one hundred yards below the mines of coal and ironstone. The coal *and ironstone, in that case, were first gotten, and afterwards the limestone was worked by means of the same pit-shafts, which [*68] were sunk down to it. "Mines of limestone" are expressly mentioned in acts of parliament relating to places in the neighbourhood.

The case was argued in Hilary term by

Campbell, Macmahon, and Whateley, in support of the order of sessions. The property in question is not rateable ; first, because, according to the true construction of the statute 43 Eliz., c. 2, all mines (except coal mines) are exempt ; and the lime works described in the case are mines. That statute requires the overseers to raise a stock by taxation "of every inhabitant, parson, vicar, and other, and of every occupier of lands, houses, tithes impropriate, appropriations of tithes, coal mines, or saleable underwoods." Under these words, as the mention of underwood has been held to exclude woods, so the mention of coal mines has been held to exclude other mines, *The Lead Smelting Company v. Richardson*, 3 Burr. 1341. The ground of the decision there was, that no other mines were mentioned in the statute, and lead mines were therefore held not to be rateable. A dictum attributed to Lawrence, J., in *Rex v. Woodland*, 2 East, 164, may be cited, to show that the exemption was limited in the *Lead Smelting Company v. Richardson*, by Lord Mansfield, to such mines as were governed by laws of their own ; but that was not the ground of decision ; and in a subsequent case, *Rex v. Cunningham*, 5 East, 478, which was decided while Lawrence, J., was still a Judge *of this Court, iron mines were held to be exempt upon the first ground, viz., that they were not mentioned in the statute : and in *Rex v. Bilston*, 5 B. C. 851, it was taken for granted that an owner and occupier of an ironstone mine was not rateable in respect of the mine ; the point decided being that he was not rateable for an engine used for drawing water from the mine, and for no other purpose. All the cases, indeed, in which it has been decided that the lord is liable to be rated for the ore which is assigned to him out of the mines for his seignorage, are authorities in favour of this construction of the statute ; because, in those cases, the exemption of the mines was expressly recognised. It may be said that the cases referred to, being cases of metallic mines, only prove that such mines are exempt : and that it was held in *Rex v. Alber-* [*69]

bury, 1 East, 534, that lime works, and in *Rex v. Woodland*, 2 East, 164, that a slate quarry, and in *Rex v. Brown*, 8 East, 528, that clay-pits were not exempt. Those cases, however, proceeded on the ground, not that the produce was not metallic, but that the place from which it came was not a mine. The ground on which metallic mines have been held to be exempt, is equally applicable to all other mines, viz., that they are not mentioned in the statute. The exemption cannot be confined to metallic mines, if the ground of it be that coal mines, and those alone, are expressly mentioned. The effect of so limiting this exemption, would be to make the rateability of mines depend upon the progress of science; for several substances have, in modern times, been discovered to be metallic, which were not formerly considered to be so. Thus, soda, potassium, and magnesia, and even lime, have lately been ascertained to be metallic substances. The property in question might, therefore, even be considered a metallic mine; but independently of this consideration, the works in question are exempt, not in respect of the subject-matter which they produce, but in respect of their being mines. They come within the definition given by Dr. Johnson, in his Dictionary, of that word, viz., a place or cavern in the earth which contains metals or minerals. They answer the description of mines as much as the pits do, from which coal is usually dug or ironstone got. They are worked by means of pit-shafts and steam-engines, in the same way as coal, ironstone, and other minerals; they are, therefore, clearly mines. But it may be said, that inasmuch as there is a certain profit derived from these mines, the exemption does not extend to them, and *Rowls v. Gells*, Cowp. 451, and *The King v. The Baptist Mill Company*, 1 M. & S. 617, in which it was held that the lord of the soil, or his lessee, is liable in respect of that share of the produce of mines which has been assigned to him, may be relied upon; but those cases were decided on the ground that the shares of the lord were profits of land, and therefore rateable. In *Atkins v. Davis*, Cald. 315, 325, Buller, J., expressly says, that lead mines are exempted, not because of their uncertainty, but because the statute mentions coal mines only; and that it was so held in the case of the *Smelting Lead Company*.

Shutt and Whitcombe, contra. All mines which yield a certain, regular, and not merely casual profit, are rateable to the relief of the poor. According to the argument urged in support of the order of sessions, no buildings but houses would be rateable, because houses are the only buildings mentioned in the statute. Lands and houses are put by way of example, and therefore, shops, sheds, &c., have been held to be rateable; and one of the several queries put to the Judges in 1633, Nolan's P. L. 76, n. (2), was, whether shops, salt-pits, sheds, profits of a market, &c., be taxable to the poor, as well as lands, coal mines, &c., expressed in the statute? and the Judges resolved that all things which were real and in yearly revenue must be taxed to the poor. Coal mines, therefore (like houses), may be considered as having been mentioned in the statute as examples. It is by no means a well-established rule of construction of the statute 43 Eliz., that the express mention of coal mines in that statute virtually excludes all other mines. In *The Smelting Lead Company v. Richardson*, 3 Burr. 1341, neither Lord Mansfield nor Wilmot, J., relied solely upon that ground for their judgments. The judgment of the latter proceeded, principally, on the ground that the profits were casual. Lord Mansfield in *Rowls v. Gells*, Cowp. 451, and Buller, J., in *Rex v. Carlyon*, 3 T. R. 385, assigned that as a reason why lead mines are not rateable within the statute; and in *Rex v. Woodland*, 2 East, 164, Lawrence, J., says, that the virtual exemption of mines in the statute 43 Eliz. was confined by Lord Mansfield in the *Smelting Lead Company v. Richardson* to such as were governed by particular laws of their own. In *The King v. The Baptist Mill Company*, 1 M. & S. 612, Lord Ellenborough considered it to be a debateable question, whether the naming coal mines in the statute was, according to the rule *expressio unius exclusio alterius*, to all intents an exclusion of other mines, or was only put for example; and he observed that the Judges who had held it to amount to the exclusion of

other mines, had generally coupled it with this reason, "that other mines were subject to risk." It is true, that in *Rex v. Cunningham*, 5 East, 478, the Court seem to have been of opinion that iron mines were not rateable, but there the point was not argued; for it was conceded that they were not rateable, not being named, as coal mines are, in the stat. 43 Eliz. c. 2; and in the late case of *Rex v. Bilston*, 5 B. & C. 851, the point was not contested. Those cases, therefore, are not entitled to much weight. Assuming, however, that the mention of coal mines in the statute of 43 Eliz. be a virtual exclusion of other mines, it can only be of such other mines as were known at the time of the passing of that statute, and a lime mine, not being one then known, is not within the exception. Secondly, the works described in the case do not constitute a mine. Whether an excavation in the earth be a mine or not, does not depend on the depth of the pit from which the mineral is obtained, or the mode by which it is obtained, but upon the substance procured; for if stone or slate were obtained from ever such a depth, the place from which it was obtained would not be called a mine, but a quarry. If the mode of working constituted one or the other, it might be contended that, by an alteration in the works, that which had been a quarry might become a mine, though the same substance continued to be gotten; which would lead to great uncertainty and inconvenience. *Cur. adv. vult.*

*Lord TENTERDEN, C. J., in the same term delivered the judgment of the Court. [*73]

We are of opinion that the property in question is not rateable, and that the decision of the court of quarter sessions is right. The cases on the subject were all very properly quoted in the argument at the bar, and, therefore, I do not think it necessary to refer again distinctly to them. I take it to be now established as law by the several decisions, that the expression of coal mines in the statute 43 Eliz. has the effect of excluding all other mines, according to the maxim "expressio unius." The dicta and opinions of several Judges before whom questions of this nature have been brought, may, I think, be considered as expressing the reasons by which they supposed the legislature to have been influenced in making coal mines rateable, and coal mines only. I must confess, that much that has been thus said is by no means satisfactory to my own mind, and that I feel great difficulty in an endeavour to reconcile the several dicta with each other. But it is not necessary to do this. The rule of construction has been established and acted upon for a long time, and ought to be adhered to, unless we could say positively that it is wrong, and productive of inconvenience. I can find, certainly, no inconvenience in the rule; an attempt to alter or to depart from it would introduce a new subject of litigation and expense. Considering, then, as we do, the rule of construction to be established, the only remaining matter or question will be, whether the property or limestone which has been rated is properly a limestone mine; and this, perhaps, is rather a question of fact than of law. The description of the manner in which the stone in question is obtained *and raised, namely, by sinking shafts perpendicularly down to the stratum, which lies considerably below the surface of the ground, [*74] and then working the stratum by roads and gateheads, with the necessary provision for air, and raising the stone to the surface by machinery, or carrying it under ground to a tunnel, is the exact description of the present usual mode of mining; of the mode used in obtaining coal, and of the mode used in obtaining ironstone. Ironstone obtained in this manner, has been held not to be rateable; why, then, should limestone be? What difference is there between the two? The only difference that has been suggested is, that ironstone contains a quantity of metal, and is procured for the sake of the metal it contains. But, if the existence of metal be necessary to constitute a mine, salt works, from which salt is obtained in the way that this stone was obtained, will not be mines, nor, indeed, will coal works be mines, though, in the statute itself, they are so called. And to deny the character of a mine to the works in question would, as it appears to us, be to depart from the ordinary and proper meaning of that word in the

English language. We are therefore of opinion, that the order of sessions must be confirmed. Order confirmed.(a)

(a) In *The Case of Mines*, Plowd. 333, it is said in argument, that there are two kinds of mines: viz. mines royal, consisting of, or containing, gold or silver, and base mines, "which consist only of base metals, or base substances, as copper, tin, lead, iron, or coals, not having in them gold or silver." Mines of coal, iron, and stone are mentioned, Year Book, 17 Edw. 3, 7 b (Viner's Abr. tit. *Waste* (D)); mines of metal, coal, or the like, in Co. Litt. 53 b; alum mines, in stat. 21 Jac. 1, c. 3, s. 11. See a distinction between mines and pits, 1 Vin. Ab. tit. *Mine* (A), from *Clavering v. Clavering*, Cas. Ch. temp. King.

*75]

*The KING v. POWELL.

The first count of an indictment charged an assault with intent to ravish; the second a common assault. The jury found the defendant guilty of the *misdemeanor and offence* in the said indictment specified, and the Court adjudged him for the said misdemeanor, to be imprisoned two years, and kept to hard labour: Held, upon writ of error, that the word "misdemeanor" was nomen collectivum; that the finding of the jury, therefore, was in effect that the defendant was guilty of the whole matter charged by the indictment, and, consequently, that the judgment was warranted by the verdict.

THIS was a writ of error to reverse a judgment given at the Surrey October sessions 1830. The first count of the indictment charged an assault upon one Caroline Livermore, with intent her against her will feloniously to ravish, &c. The second, "that the said Henry Powell, afterwards (to wit) on the same day, and in the year aforesaid, with force and arms, at, &c., aforesaid, in and upon her the said C. L. did make an assault, and her the said C. L. then and there did beat, wound, and ill-treat." The record stated the finding of the jury, and judgment, as follows: that "the said Henry Powell is guilty of the *misdemeanor and offence* in the said indictment specified, in manner and form as by the said indictment is alleged against him; whereupon all and singular the premises being seen, &c., it is considered and adjudged by the Court here, that the said Henry Powell, for the said misdemeanor, be imprisoned in the house of correction at Guilford, in the said county of Surrey, for the space of two years, and be there kept to hard labour." In Hilary term,

White was heard in support of the writ of error. The terms of this verdict, as entered on record, leave it in doubt whether the jury found the defendant guilty on that count only, which would warrant the judgment. It is in the singular number—"guilty of the misdemeanor and offence in the said indictment specified,"—and is, therefore, equally applicable to the second count, which *76] would not warrant the punishment of hard labour, as to the first, which would; and this uncertainty vitiates the finding, and the judgment consequent upon it. In *The King v. Salomons*, 1 T. R. 249, an information on the Lottery-Act, 22 G. 3, c. 47, charged that the defendant, on the 27th of December, 1785, kept an office for dealing in shares of lottery tickets, and did, on that day, receive of one A. a sum of 3s. for a share in a ticket, without a license; and the said defendant, on the said 27th of December, at the same place, kept an office for registering lottery tickets, and did receive of the said A. 3s. for registering a lottery ticket then undrawn, without a license. The defendant there was adjudged to be convicted of the *said offence* charged upon him in and by the said information, according to the form of the statute in that case made and provided; and the justices awarded and adjudged that he had forfeited and should pay for his "*said offence*, 100l." It was held there, that the conviction was bad, for the duplicity of the charge: the defendant being charged with dealing in shares of lottery tickets, and with registering without a license, and convicted of the said offence, so that it did not appear of which offence he was convicted. In that case, the conviction would have been warranted by either of the offences charged; whereas here the judgment of hard labour was wholly inapplicable to the offence charged in the second count.

Platt, contra, was stopped by the Court.

LORD TENTERDEN, C. J. I am of opinion that the judgment in this case ought to be affirmed. In *Rex v. Salomons*, 1 T. R. 249, the information charged the defendant with two different offences, each of which would subject him to a separate penalty of 100*l*. The justices convicted him of the *said offence* charged upon him by the information, and adjudged that, for his *said offence*, he should forfeit the sum of 100*l*. Now, if the words *said offence* included both the offences charged in the information, the judgment should have been for two penalties instead of one. But, in this case, the first count charges the defendant with an assault with an intent to ravish; the second with a common assault. The jury were to try the whole matter; and they found that the defendant was guilty of the misdemeanor and offence in the said indictment specified, in manner and form as by the said indictment was alleged against him. I agree, if the words "misdemeanor and offence" must be understood as relating to one only of the matters charged, the judgment cannot be supported; but whatever might be the meaning of the word "offence," the word "misdemeanor" is *nomen collectivum*. The finding of the jury, that the defendant is guilty of the misdemeanor, is, in effect, that he was guilty of the whole matter charged by the indictment. The judgment, therefore, is warranted by the verdict. [*77]

LITLEDALE, J., concurred.

TAUNTON, J. The argument in support of the error assigned has turned upon a critical consideration of the terms of this record. Now, independently of the reason given by my Lord, in which I concur, looking at *the whole of the record*, I am by no means clear that two offences are charged in the indictment. If we are to spell the indictment in one place, we must do so in another. It states, first, that the defendant committed an assault on Caroline Livermore, with intent feloniously to ravish her: and then, in the second count, that the defendant, on the same day, at the same place, committed *an* assault, not *another* assault, on the said Caroline Livermore: and this second count would be borne out by the same evidence as the first, though not *à converso*. But the jury having found the defendant guilty of the *misdemeanor and offence* in the indictment specified, in manner and form as alleged, I have no doubt on the subject. [*78]

PATTERSON, J. I concur with my Lord, that the word "misdemeanor" is *nomen collectivum*; and that finding the defendant guilty of the misdemeanor in manner and form as by the indictment alleged, is finding him guilty of the whole matter charged by the indictment. Judgment affirmed.

SCOTT v. BEVAN.

In an action brought in England to recover the value of a given sum Jamaica currency, upon a judgment obtained in that island; the value is that sum in sterling money which the currency would have produced according to the actual rate of exchange between Jamaica and England at the date of the judgment.

DECLARATION on a judgment recovered by the plaintiff in the Supreme Court of Jamaica, on the 1st of October, 1827, for 155*l*. 16*s*. 8*d*. current money of the island of Jamaica, with interest on the said sum from the 31st of December, 1825, and also 8*l*. 19*s*. 8½*d*. *current money for his costs. The declaration contained an averment that the damages, costs, and charges in form afore- [*79] said recovered, at the time of the recovery thereof, were, and still are, of great value, to wit, of the value of 1117*l*. 0*s*. 3*d*. of lawful money of Great Britain, and that the interest on the said damages, &c., amounted to a certain other sum, to wit, the sum of 116*l*. 13*s*. 1*d*. of like lawful money. Plea, the general issue. 1102*l*. 7*s*. 8*d*. was paid into court. At the trial before Lord Tenterden, C. J., at the London sittings after Trinity term 1829, the plaintiff proved the judgment recovered in the Supreme Court of Jamaica, and that 140*l*. currency, taking

the rate of exchange at par, was equivalent in value to 100*l.* sterling, the usual mode of reducing currency into sterling being by dividing the amount by 7, and multiplying by 5. The defendant proved, that on the first of October, 1827, when the judgment was obtained, and from thence to the commencement of the action, bills upon England were in Jamaica at a premium of 22½ per cent.; 100*l.* sterling, at that rate, being worth 171*l.* currency; but taking the exchange at 19 per cent. (which was 3½ per cent. less than the actual exchange), the value of 100*l.* sterling was 166*l.* 12*s.*; and 1836*s.* 10*s.* 8*d.*, being the amount of the principal sum recovered, and costs, together with interest at 6 per cent., from the 31st of December, 1825, to the 2d of December, 1828, when the money was paid into Court, was, in sterling money, 1102*l.* 7*s.* 3*d.* Lord Tenterden was of opinion, that in point of law 100*l.* sterling was to be considered equivalent only to 140*l.* currency, and the jury, under his direction, found for the plaintiff. A rule nisi had been obtained for a new trial upon the ground that

*80] the plaintiff would only be entitled to be paid that sum *in sterling money, which would equal the value of 1836*l.* 10*s.* 8*d.*, Jamaica currency, at the rate of exchange between Jamaica and England at the date of the judgment, and the sum paid into court would exceed that value. In Trinity term last, Sir *James Scarlett* and *Hibbert* were heard against the rule, and *Campbell* and *Comyn*, *contra*, and the Court afterwards ordered the case to be argued a second time by one counsel on each side. It was accordingly argued in Hilary term by

Sir *James Scarlett* against the rule. The evidence given on the part of the plaintiff, shows that 100*l.* sterling was in Jamaica equivalent to 140*l.* currency. 1836*l.* 10*s.* 8*d.* currency will, then, produce 1311*l.* 16*s.* sterling: that sum in sterling money, carried to Jamaica, would produce 1836*l.* 10*s.* 8*d.* currency. The defendant claims to deduct, not merely 40 per cent. from the amount of the currency recovered, but such a further sum per cent. as the plaintiff must have paid by way of premium for bills of exchange, if he had wished to draw the sum recovered by bills on England: but the plaintiff was not bound to take bills on England; if he had had his money in Jamaica, he might have invested it there, in the purchase of land or goods, or he might have remitted it in specie to some other country, in which case he would only lose the amount of freight and insurance. He is entitled to recover the exact value of his debt in sterling money. The debtor cannot compel him to run a risk by receiving payment of his debt by a bill on England. If the value of a debt in Jamaica currency is to vary with the exchange with England, it may become the interest of the debtor to postpone payment until the exchange falls. He may, after compelling his creditor to sue him in Jamaica, come to this country; and then the creditor, in an

*81] action on *the judgment, will recover a less sum than he was entitled to at first. The plaintiff, after taking the money out of court in this country, might, as it is contended, have directed a correspondent to draw on him for the amount; but the premium upon bills on England might fall in the mean time, and then the sum recovered at the rate of exchange at the time of the judgment would be insufficient. [PARKE, J. According to your argument, if a party received 100*l.* here, he would only get 140*l.* currency: yet if at that time the holder in Jamaica of a bill on London for 100*l.*, when the exchange was 19, got 162*l.* 10*s.*, then, as a bill for 100*l.* cannot be worth more than 100 sovereigns, one hundred sovereigns taken to Jamaica must produce more than 140*l.* currency.] If the owner of 100 sovereigns wished to remit them speedily and without risk, and took a bill on a house of great credit, at ninety days' sight, he must pay a premium. The creditor here is compelled to follow his debtor to another country; he is not to be considered in the same situation as if his intention had been to receive his money in London at the time when he recovered it. A creditor, under such circumstances, is not to be obliged to take his payment in the manner the debtor points out. Wherever the value of foreign money can be rendered in English, the rule is, for any legal purpose, to estimate it at par. In *Cockerill v. Barber*, 16 Ves. 461, there was a legacy in sicca rupees by a will in India: and it was held, that when paid by remittance to this country, the pay-

ment must be according to the current value of the rupee in India, without regard to the exchange or the expense of remittance.

**Campbell, contra.* The question is, what was the value of 1836*l.* 10*s.* 8*d.* Jamaica currency in sterling money, when the judgment was recovered? [*82] whether the criterion of value be the nominal par of exchange, or the real par of exchange, that is, the market price in sterling money, which that quantity of Jamaica currency could be purchased for at the date of the judgment? That was a question of fact, and ought to have been left to the jury. The pound currency is an imaginary sum; it is represented by no coin. The real currency in Jamaica is sovereigns, Spanish dollars, and doubloons. The plaintiff is entitled to recover that sum in sterling money, which would have produced 1836*l.* 10*s.* 8*d.* Jamaica currency. The creditor ought not to suffer any damage, nor the debtor to derive any advantage, by reason of the money being paid in England. It is not true that the defendant seeks to deduct from the sum which would otherwise be the value of the currency in sterling money the amount of premiums which would have been paid in Jamaica on bills of exchange upon England. The question being, what the value of a given sum in currency is in pounds sterling, the premium paid on bills of exchange is used only as a mode of ascertaining that value. Now the value of a sovereign in Jamaica depends on the course of exchange. If the defendant had, in October 1825, paid the plaintiff in Jamaica 1102 sovereigns and a fraction, the sum paid into court, calculating (at an exchange of 19 per cent.) 100 sovereigns to produce 166*l.* 12*s.*, the sovereigns paid into court would produce 1836*l.* 10*s.* 8*d.* That would have discharged the debt in Jamaica; so it will in England. There cannot be a difference of 22½ per cent. between the real par and the actual exchange. The only [*83] difference will be the expense of freight and insurance. The nominal par of 140*l.* to 100*l.* cannot be a just rule in this case, for there must be the same mode of calculation whether the exchange be favourable or otherwise; and the creditor ought not to be permitted to elect to take the nominal par if the exchange be favourable, and the real par if it be not. But if an action had been brought on this judgment immediately after it was given, and 100*l.* sterling would, at the then rate of exchange, have produced not 140*l.* currency, but 120*l.* only, the creditor would not then have elected to take his money at the nominal par. On the other hand, supposing an action to have been brought in Jamaica on an English judgment for 100*l.* sterling, the plaintiff would not be entitled to recover 140*l.* currency only, but such a sum in currency as would enable him to obtain 100*l.* sterling. It is impossible that 100 sovereigns, if carried to Jamaica, would be worth only 140*l.* when a premium of 22½ per cent. is given for bills on England. At that rate per cent., 100 sovereigns would purchase a bill for 171*l.* currency, if the sovereigns were remitted to England and drawn against, and the purchaser of the bill would pay 171*l.* currency for it. It is absurd to say, that the nominal par is in all cases the test of value. In Sweden, accounts are kept in rix dollars, which are of the nominal value of 5*s.* sterling; but the currency being depreciated, the real value is only 1*s.* 6*d.*, and 13 rix dollars and a fraction are required to represent the pound sterling. If a creditor were to sue his debtor in Sweden for 100*l.* sterling, he would be entitled to recover not 400 rix dollars (taking them at the nominal par), but as many rix dollars as would produce 100*l.* The debtor is not thereby damnified, for he must have remitted to England that number of dollars to pay his creditor. [*84] So the sicca rupee originally represented an English half crown, the same quantity of silver being originally in each coin, but the rupee is now so deteriorated that it is worth only 23 pence. It therefore no longer really represents a half crown, though it does so nominally in accounts. When, therefore, a balance of account is to be paid in sterling money, the question is, how much gold and silver it will take at the market price to purchase a given number of rupees? So that the true value is the real and not the nominal par of exchange. In *The Earl of Dungannon v. Hackett*, 1 Eq. Ca. Abr. 288, J. S. contracted a debt in Ireland, and coming to England he was arrested here for the debt, and

it was held that he must pay Irish interest; but it was also held reasonable, that as the money was now to be paid here, the plaintiff should have an assurance for the return of it out of Ireland. *Ekins v. The East India Company*, 1 Peere Williams, 395, is to a similar effect. In *The Marchioness of Lansdowne v. The Marquis of Lansdowne*, 2 Bligh Parl. Ca. 60, a rent charge out of Irish estates was made payable in Ireland in English currency. It was held that although the rent charge was payable in Ireland in the currency of England, that the appointee was not entitled to have the sum transmitted to England free of the charge of conveyance and exchange; in other words, he was to have such a sum in England, as would have produced the amount in Ireland. *Cockerell v. Barber*, 16 Ves. 461, is in favour of the defendant; Lord Eldon there does not refer to any nominal par, but says the *85] current value of the rupee is to be taken at the time when the money is *payable. Here, the only estimate of current value is to be formed from the value of bills at the time in question. *Cur. adv. vult.*

Lord TENTERDEN, C. J., in the same term, delivered the judgment of the Court.

This was an action on a judgment recovered in Jamaica; money was paid into Court. The question was, how the value of the sum recovered should be estimated? The plaintiff contended, it should be as 140% currency to 100% sterling, without regard to the rate of exchange at any particular time. The defendant, that it should be estimated according to the exchange; and the payment, upon that supposition, was more than sufficient, taking the rate of exchange at the commencement of the action, or for some time before or afterwards. The practice has probably been in favour of the plaintiff: but there is no case that decides the question. Upon the whole, we think the defendant's mode of computation approximates most nearly to a payment in Jamaica in the currency of that island; though, speaking for myself personally, I must say that I still hesitate as to the propriety of this conclusion.

The proportion of 140% to 100% enters into every calculation: when bills in Jamaica are at a premium, a bill drawn upon England for 100% may be sold and turned into currency at Jamaica for more than 140%. If such bills are at a discount, a bill for 100% will sell for and produce less than 140%. Such bills were at some premium at the time of the judgment recovered, and at all times since. And it is true, undoubtedly, that if the plaintiff should wish to send the money *86] that he may receive under the judgment of this Court to Jamaica, *where the money was originally due and recovered by the judgment in that island, the mode to be adopted, according to the most general and practicable, if not the only usage, would be to get some person resident in that island to draw upon him for the amount of the sterling money recovered here; and this might be done by bills drawn at the exchange, on which the defendant relies, and which is at the rate of more than 140%, namely, about 160% currency to 100% sterling; so that a less number of hundreds of pounds sterling, than in the proportion of 140% to 100%, would place him in the situation of receiving his principal and interest, viz. 1836% 10s. 8d. currency in the island of Jamaica. The rule, therefore, must be made absolute for a new trial. *Rule absolute.(a)*

(a) In an action brought in Jamaica for a debt of 100% sterling contracted in England, the plaintiff recovers judgment for 140% currency, but by showing (on affidavit) the rate of exchange on the day the execution is lodged, he has added to the 140% currency the amount of the premium (if there be any) on bills of exchange on England. Thus, if A. sues B. for 100% sterling, he recovers judgment for 140% currency, and if he shows by affidavit the exchange on England to be 22% 10s. per cent., he has added to the sum mentioned in the judgment 31% 10s., and the writ issues for 171% 10s. This practice, however, is founded on an act of the colonial legislature. *Ex relatione Barge*, late Attorney-General of Jamaica.

*DOE dem. THOMAS GARROD v. JOHN GARROD. [*87]

A testator being seised in fee of freehold land, and of copyhold according to the custom of the manor (the freehold and copyhold being intermixed), devised as follows:—"As to my worldly estate, I dispose thereof as follows: I give to my nephew T. G. all my lands, to have and to hold during his life, and to his son if he has one, if not, to the eldest son of my nephew T. G. and to his son after him, if he has one, if not, to the regular male heir of the G. family." By codicil stating that his nephew T. G. then had a son born, he gave to that son, after his father's decease, all his freehold and copyhold lands; and to his eldest son, if he had one; but if he had no son, then to the next eldest regular male heir of the G. family." By the custom of the manor, copyhold lands, parcel thereof, of which any tenant died seised in fee, passed by descent to the youngest son: Held, that by the will and codicil the son of T. G. took an estate tail, and that, consequently, upon his death the copyhold lands descended to the youngest son.

EJECTMENT for certain premises at Stratford, in the county of Suffolk. At the trial at the Spring assizes for the county of Suffolk, 1829, a verdict was found for the plaintiff, damages 1s., subject to the opinion of the Court on the following case:—

The premises in question are situate at Stratford, otherwise Stratford St. Andrew, in the county of Suffolk; part thereof is parcel of the manor of Stratford, and the residue parcel of the manor of Griston, both in the said county, and held of the lords of the two manors respectively, by copy of court roll according to the respective customs thereof. By the customs of each of the manors, lands, parcel thereof, are devisable by will, and further, by the customs of each, lands, parcel thereof, of which any tenant dies seised in fee, pass by descent to his youngest son, which youngest son is heir of such tenant according to the customs of the respective manors. No instance has been found upon the court rolls of either manor of the admission of an heir in tail male, but there is an instance in the manor of Stratford, of the admission of a youngest son as heir in tail general; and in the manor of Griston, of the descendant of a youngest son being vouched in a customary recovery as heir of an estate in tail general to bar such entail.

*On the 9th of January, 1712, at courts then held for the said manors of Stratford and Griston respectively, John Garrod was duly admitted to [*88 the copyhold premises mentioned in the consent rule in this cause, to hold to him and his heirs according to the customs of the said manors; and he afterwards duly surrendered the said copyhold premises to the use of his will, which surrenders were at courts held for the said manors respectively, on the 8th of April, 1729, duly presented and enrolled.

On the 10th of December, 1772, the said John Garrod, being seised as above mentioned, of the said copyhold premises, for the recovery of which this action was brought, and being also seised in fee-simple of certain freehold premises at Stratford lying intermixed with the said copyhold premises there, made and published his will, duly executed and attested, and therein devised as follows:—"As to my worldly estate, I dispose thereof as follows: Item, I give to my nephew Thomas Garrod of Rendham, in the county of Suffolk, all my lands, houses, and tenements lying in the manors of Stratford, Carleton, and Kelsel" (comprising the premises in question), "to have and to hold during his natural life, and to his son, if he has one, if not, to the *eldest* son of my nephew James Garrod, during his natural life, and to his son after him, if he has one, if not, to the regular male heir of the Garrod's family, as long as there is one of them in being, and if they should be all extinct, then to the regular heir of my nephew Thomas Field's family." On the 18th of August, 1773, the testator made a codicil, duly executed and attested, to his said will as follows:—"I received a letter from my nephew Thomas Garrod, my friend, of Rendham, in Suffolk, that his wife was safely *delivered of a son; I do give and bequeath to him, [*89 after his father's decease, all my houses, lands, and tenements lying and being in Stratford, Carlton, and Kelsel" (comprising the premises in question), "both freehold and copyhold, in the county of Suffolk, and to his *eldest* son, if

he has one ; but if he has no son, then to the next eldest regular male heir of the Garrod's family, as long as there is one of them in being."

The testator John Garrod shortly afterwards died without revoking or altering his will, except as it was altered by the said codicil, and without revoking or altering the codicil, and he left his said nephew, Thomas Garrod, him surviving. The will and codicil were duly proved, and Thomas Garrod was, at the manor courts for Stratford and Griston, admitted to the said copyhold premises, to hold the same for his natural life, according to the form and effect of the will and codicil. Thomas Garrod died, without having made any will as to the premises in question, some time before the 9th of January, 1781, on which day, at courts then held for the said manors, John Garrod, the son of Thomas mentioned in the codicil, was admitted to the said premises, to hold the same to him, John Garrod, according to the said will and codicil. The last-mentioned John Garrod, who was the only son and heir of Thomas, on the 21st of October, 1802, made his will, duly executed and attested, and thereby devised all his freehold and copyhold messuages, lands, and hereditaments to Sarah his wife (who is now living), with remainders over, and, on or about the 22d of October, 1802, he died without having altered or revoked the said will, and without having surrendered to the use of his will in either of the manors. At courts held for the *90] said manors *respectively in the year 1804, Thomas Garrod, the lessor of the plaintiff, then an infant of the age of two years, was admitted in fee to the premises in question *as youngest son and heir*, by the respective customs of the manors, of the last-mentioned John Garrod, but he has never had possession. The defendant, who is the eldest son of the last-mentioned John Garrod, entered into the premises at Michaelmas 1826, and still holds the same. It was agreed that the Court might come to any conclusion upon the facts of this case which the jury might have formed.

Preston for the plaintiff. Thomas Garrod's son, to whom the gift was made, took an estate tail, *Doe v. Halley*, 8 T. R. 5. There the devise was to A. for life, without impeachment of waste, remainder to his eldest son, and the heirs of such eldest son, and in default of issue male of A. then to B. ; it was held, that A. took an estate for life, remainder to his eldest son in tail, remainder to himself in tail. It will be contended, perhaps, that, by the words of this codicil, the eldest son took the fee. But the words "eldest son" in this case appear from the subsequent words to be used as denoting not an individual, but a class, viz. all the male descendants of the person to whom the gift was made. "Son," therefore, is a word of limitation, and not of purchase ; and that being so, the son of Thomas Garrod, by the devise to him and his eldest son, if he should have one, took an estate tail. *Sonday's case*, 9 Rep. 127, *Bifield's case*, cited *91] in 1 Ventr. 231, *Robinson v. Robinson*, 1 Burr. 38, and *Mellish v. Mel-* *lish*, 2 B. & C. 250, where all the authorities are collected. And, assuming that to be so, the estate tail (so far as the copyhold lands are concerned) descended to his youngest son ; because it is an established rule of law that where the fee-simple would go to the youngest son, an estate tail will do so likewise, *Robinson on Gavelkind*, 119, ed. 1822, where there is no special custom to the contrary, as there was in *Chapman v. Chapman*, March, 54.

Biggs Andrews, contra. This ejectment is brought to recover copyhold land holden of manors, where by the custom it goes to the youngest son. The copyhold and freehold land lie intermixed, and the testator disposes of both by the same clause. The lessor of the plaintiff, who is the youngest son of the person last seised, is to make out that he is entitled to take the copyhold in preference to the eldest. He contends that he may take it by virtue of the devise to the person last seised and his *eldest* son. It is not disputed that words of purchase may be construed to be words of limitation, in order to effect the manifest intention of the testator. The intention here is clearly expressed in the will, that the eldest son of Thomas Garrod's son should take. To construe the words "*eldest son*" as words of limitation will have the effect of taking away the copyhold lands from the person clearly pointed out in the will. In *Sonday's case*, 9

Rep. 127, the words issue and son were both used, and the word *issue* in a will, is *prima facie* a word of limitation. In Bifield's case, the "son" was not a person expressly designated; the devise was to A., and if he died not having a son, then, &c. In Robinson v. *Robinson, 1 Burr, 58, the words were "such son as he shall have," which meant all sons; and a case being there referred [*92 to, where the words were *eldest son*, it was observed by way of distinction in the principal case, that it was, there, not necessarily an originally eldest son, but might be any other son who became eldest son before the contingent remainder vested. In all the cases where the words issue and son have been held to be words of limitation, that construction has been necessary in order to effect the clear intention of the testator. Here, the devise to A. and his eldest son is in a case where the eldest son is a person who would not take as heir. By the codicil, the testator gives the estate to the eldest son of Thomas Garrod then born, and afterwards to his (the son's) eldest son, if he has one. The defendant is that eldest son. It is impossible to give a general interpretation to words so clearly designating him. In Lovelace v. Lovelace, Cro. Eliz. 40, J. S. being seised in fee of land, devised it to J. D., and to his eldest issue male, he having no son at the time. It was adjudged no estate tail, but for life only, and it was said, if he then had a son it was all one; that a devise to one and his issue male was an estate tail, but that here the word *eldest* would not permit that construction. And it is said that, in that case, the lands were gavelkind, Perrot's case, Moore, 368. To put precisely a similar case; suppose this was a devise to A. and his youngest son, would it be equivalent to a devise to A. and his heirs? yet here the youngest son is heir. It does not lie on the defendant to show what estate he took; it is sufficient for him to show that he took some estate under the will. The *plaintiff cannot succeed unless he shows that the son of Thomas Garrod took an estate tail. But looking to the language of the will, there [*93 is ground even for contending that the son of Thomas Garrod took a fee; for the introduction of the words, "*as to my worldly estate*," shows an intention to pass the whole estate, Doe v. Gilbert, 3 Brod. & B. 85, Hogan v. Jackson, Cowp. 299. In Mellish v. Mellish, 2 B. & C. 520, the word "*eldest*" occurred, not in the devise to the son, but in that to the daughter, and it was not contended that an estate in tail female was taken. There is nothing here to show that the testator looked further than the eldest son. It is said that he contemplated *all* the sons. That would, in effect, be introducing into the will, after "*the eldest*," the words "*and other sons*;" but they cannot be introduced, for that would prevent the words in the will from having any operation. Suppose that a fee did not pass, still there are the words "*eldest son*," and they must be construed according to their plain import. In all the cases cited, the particular intent of the testator had effect given to it, though not in the way he pointed out. But in this case, the consequence of putting the construction contended for on the will, will be to prevent the object of the testator's bounty from taking the estate. One of the objects of the testator was, that the freehold and copyhold estates should go to the same person. If the construction contended for prevail, that object will be defeated; for the eldest son will at all events take the freehold property. Besides, there is no sufficient evidence to show that by the custom the youngest son does take an estate tail. The youngest son being vouched in the recovery is not *conclusive. The principal question, however, is, did the testator contemplate a class or an individual? Here he points out [*94 the individual. The estate is given expressly to the eldest son of the son of Thomas Garrod. The defendant is therefore entitled to it.

Preston in reply. The fallacy of the argument for the defendant consists in this; that it assumes that the word *son* describes an individual, but looking at the context, it evidently describes a class, viz., *heirs male*. The cases cited in favour of an estate in fee do not apply, because here is a clear limitation over; therefore it must be an estate for life, or in tail. In order to effect the general intent, it must be an estate-tail. Lovelace's case, Cro. Eliz. 40, if it had occurred at the present day, would have been decided otherwise. In Dubber v. Trollop,

8 Vin. Abr. 233, a devise to testator's first son William for life, remainder to the heirs male of his body, remainder to his second son Thomas for life, and after his death to the first heir male of his body, was held to pass an estate tail to Thomas. In Archer's case, 1 Rep. 66 *b*, there cited, a devise to a father for life, and after to the next heir male, *and the heirs male of such heir male*, was held to be only an estate for life in the first devisee; but the reason of that, as stated by Lord Hale, in King v. Melling, 1 Ventr. 215, was, that the words of limitation were annexed to the word heir, and therefore *heir* was taken to be but designatio personæ; and in Dubber v. Trollop it is observed, that "from hence it appears that devise to A. for life and *his heir male* in the singular number, and to A. for life *and his heirs* *95] *male*, in the plural number, is the *same; and though an express estate for life is devised, yet it shall be an estate tail." [Andrews. There the word was *heir*; that is a word of limitation, and the endeavour was to cut it down; here the word is "*son*," which is a word of purchase.] The testator clearly gives his freehold property in tail, and his intent was the same as to his copyhold. No argument can be derived from the division of the property. That is a consequence of law, which the testator may not have foreseen.

Lord TENTERDEN, C. J., now delivered the judgment of the Court, after stating the case, as follows:—It is stated as a fact, in this case, that, by the custom of the manors, the youngest son takes the tenements of which his father died seised in fee-simple, and we think the extracts from the court rolls sufficiently show that the same son takes also by the custom the tenements of which his father died seised in tail. Indeed, without a special custom to the contrary, it seems that he who takes in one case must take in the other also, for in each case, the estate is taken by descent. And this is conformable to the custom of gavelkind as mentioned in Robinson's Treatise, p. 119. This is one of the cases in which a court is called upon to construe the will of a person, who, probably, had no clear distinct view or intent in his own mind, and certainly no intent of which every part can legally take effect. The question is, what estate John, the son of Thomas Garrod, took under the will of his great-uncle?

If this John took the fee, the gift over to the heir male of the Garrod family must fail, as being too remote.

If he took for life only, the remainder to his son would be contingent, and *96] might be defeated and never *vest, if he should think fit to destroy his own life estate before the birth of a son, though the testator certainly intended that a son should take. Indeed at the common law if he did no act, and died leaving his widow enceinte of a son, the son could not take. And if the son of John is to take any estate, a similar difficulty will occur in finding *what* estate he is to take. If he take for life only, and the other sons are intended to take estates for life only in succession, this intention cannot have effect, because an estate for life cannot be given to a person not in esse in remainder after a precedent estate for life to a person not in esse; and if the eldest son is to take the fee, then the remainder over will be defeated in the same way as if his father, the son of Thomas, took the fee. There are no words of inheritance applied to the son of John; he cannot have an inheritable estate unless he takes by descent; and it being plainly not intended that his father John or his grandfather Thomas should take a fee, nor the estate go over to the next heir male of the Garrod family, while issue male of John should remain, the greatest chance of effecting the general intent of the testator is to hold that this John, the son of Thomas, took an estate tail. This decision, giving an estate tail to John, will be warranted by Sondag's case, Rep. 127, cited by Mr. Preston.

It is true that if John took an estate tail, it was in his power to defeat his issue and all subsequent estates; but this same consequence would happen in many of the cases in which the first taker has been held to have an estate tail, *97] and in some in which that consequence *had actually happened before the decision. It is true also that in the event which has happened, of this John leaving two sons, the testator's intention of keeping the freehold and copy-

hold together will not take effect. This, however, is a consequence of law ; it is a matter that the testator never thought of ; perhaps he never knew the custom ; and it is a consequence that would equally follow in a course of descent, whether in fee or tail.

Upon the whole, we think John, the son of Thomas, took an estate tail, and that the lessor of the plaintiff is entitled to recover the copyhold, and the postea is to be delivered to him.

Judgment for the plaintiff.

The Right Hon. Sir LAUNCELOT SHADWELL, Knight, v.
HUTCHINSON.

It is no defence to an action for obstructing ancient lights, that the nuisance merely affects the plaintiff's right as reversioner, and that he has already, in a former action, recovered against the defendant for the same obstruction.

CASE, for obstructing the ancient window of a house, by keeping and continuing a certain roof, before then wrongfully erected, adjoining the said house, to the injury of the plaintiff's reversion. Plea, a former judgment recovered by the plaintiff against the defendant for the same grievances. Replication, that the grievances were not the same ; and issue joined thereupon. On a former trial between these parties, for an injury to the plaintiff's reversion in the same premises by erecting and keeping up a roof adjoining thereto, so as to obstruct an ancient light, it was proved that the defendant had a workshop, the roof of which originally came up in a slanting direction to the wall at the back of the plaintiff's house, below the window in question ; and that the defendant afterwards raised the roof so as to bring it above the window, which was thus excluded from the *light, except such as it received from the defendant's skylight : [*98 but the obstruction might be removed in two or three days.(a) The plaintiff then recovered nominal damages for the injury to his reversion. On the trial of the present cause before Lord Tenterden, C. J., at the sittings in London before last Hilary term, it appeared that at the time when this action was brought the obstruction had neither been removed nor increased, but that the premises continued, with respect to it, in the same state as at the commencement of the former suit. The jury, under Lord Tenterden's direction, found a verdict for the plaintiff, with 100*l.* damages.

Curwood, in Hilary term, moved for a rule to show cause why the verdict should not be set aside, and a new trial had, on the ground of misdirection. The continuance of this obstruction was no new grievance to the reversioner, though it would have been, under the like circumstances, to a party in possession. The Lord Chief Justice, at the first trial, laid down as a reason in support of the plaintiff's right to recover in such an action, that if a reversioner were prevented from suing for this kind of injury during the continuance of the lease, he might have great difficulty in proving his right when he came into possession. But after he has once established the right by a verdict, no difficulty of that kind, either from a long continuance of the injury, or from the death of witnesses, can affect him in future. One record will as completely support his title as many.

PER CURIAM. If the erection in the first instance was an injury to the reversion on any ground on which it can be put, the continuance must be so likewise. The continuance of the obstruction would, in fact, render the *proof of [*99 title more difficult at a future time, notwithstanding the former recovery.

Rule refused. But a rule nisi was granted for reducing the damages on affidavit of the obstruction having been abated

(a) See the case reported, 1 M. & M. 350.

BASSETT v. MITCHELL and SMITH.

The plaintiff declared in trespass for breaking his close, and set out the close by abutments. The defendant justified, alleging that the said close in which, &c., was part of an allotment of six acres made by commissioners duly authorized, for certain purposes, in execution of which he entered. Plaintiff denied that the said close in which, &c., was part of the six acres in the plea supposed to have been allotted: and thereupon issue was joined. It appeared that the close set out by abutments was not all within the allotment, but that the part in which the actual trespass occurred was within it: Held, that the justification was made out.

TRESPASS, for breaking and entering the plaintiff's close in the parish of Waterfall, in the county of Stafford (the abutments of which close were particularly set out in the declaration), and for subverting the soil, cutting down the trees, destroying a wall, &c. The defendants pleaded the general issue, and several special pleas. The second plea stated, that certain persons therein named, and who were duly authorized in that behalf, as in the plea was particularly set forth, executed an award by which they allotted six acres and two roods of certain waste lands in the manor of Waterfall, in the said county, of which six acres and two roods the said close in which, &c., was part, for getting materials to be used in making roads, and otherwise for the common benefit of the persons interested in certain new enclosures within the manor; and that the defendant Smith, being a person so interested, and also surveyor of the highways in the parish of Waterfall, and the defendant Mitchell, as his servant, did, in order to get materials for the repair of the highways within the parish, and for other purposes mentioned in the award, break and enter the close in which, &c., doing
 *100] no *unnecessary damage. The plaintiff replied, that the close in which, &c., was not part and parcel of the said six acres and two roods of the said waste or common, in the above plea supposed to have been allotted; and upon this issue was tendered and joined. There were other issues, which it will be unnecessary to notice. At the trial before Littledale, J., at the Stafford Spring assizes, 1880, evidence was given that that part of the close in which the alleged trespasses had been committed was within the allotment mentioned in the second plea, but that the allotment did not take in the whole of the close described in the declaration. Littledale, J., left it to the jury, as the question on this plea, whether the place in which the trespasses had been committed was parcel of the allotment; that is, whether the defendants had a right, not over the whole close, as set out by abutments, but over that part. The jury found, on this issue, for the defendants. In the subsequent term a rule was moved for, by leave of the learned Judge, and granted, to show cause why the verdict for the defendants on the second plea (and also on another, which raised a similar question) should not be set aside on the ground of misdirection, and a verdict entered for the plaintiff on each. In Hilary term

Campbell showed cause. The objection taken is, that the justification states a right extending over an allotment of six acres and two roods, which are alleged to comprehend the whole of the close mentioned in the declaration; whereas it appears in evidence that part of the close is not within that allotment. If this kind of exception is to be taken, it may also be said that the plaintiff's exclusive right was not shown to extend over
 *101] the whole close set out by abutments in his declaration, and that there ought, in strictness, to have been a nonsuit, or a verdict for the defendant upon the general issue, on account of this failure of proof. But as to the plea, "the said close in which, &c.," is not necessarily to be understood as extending to the whole of the close mentioned in the declaration; it is enough if the justification be supported as to that part of the land in which the alleged trespasses were actually committed. The words "in which, &c.," refer to that particular part. The opinions expressed by the Court in *Richards v. Peake*, 2 B. & C. 918, are in point. Abbott, C. J., there says: "The words, 'the close in which, &c., in the declaration mentioned,' confine that allegation to the spot where the trespass was committed: then it becomes a question of fact, whether the trespass was committed in that part of Burgey

Cleve Garden which had been enclosed and enjoyed in severalty for upwards of thirty years." And the other judges expressed themselves to the same effect. [The Court here called upon the plaintiff's counsel to support their rule.]

Peake, Serjt., *Richards*, and *Talfourd*, *contrà*. *Richards v. Peake*, 2 B. & C. 918, goes no farther than *Hawke v. Bacon*, 2 Taunt. 156, which is not unfavourable to the present plaintiff. In this latter case, the declaration gave no particular description of the close; the plea of common was equally general, and might apply to any part of the waste over which the defendant had a right of common. Then the plaintiff, in his replication, alleged that the close in which, &c., was one called Far End close, and had been *separated and enclosed from the waste for twenty years and more; and the Court held, that if [*102 the defendant had rejoined properly, the plaintiff must have failed, unless he had proved the whole of the place called Far End close to have been so enclosed. The onus of proof lay on the plaintiff; he had alleged the place in which, &c., to be Far End close; and if his proof had failed as to any part of Far End close, the defendant might have applied his justification to that part, and succeeded on the issue. And so, in *Richards v. Peake*, the plaintiff had subjected himself to the necessity of proving that the close in which the trespasses happened was one which had been enclosed for thirty years. In the present case, the declaration is not in general terms for breaking and entering a close, but it describes a particular close, setting out the abutments. The defendants plead that that close is part of a certain allotment which they describe: they have therefore taken upon themselves the onus of proving that averment to the whole extent of the close marked out in the declaration; they cannot draw an imaginary boundary dividing one part of it from the other. In *Rotherham v. Green*, Cro. Eliz. 593, the defendant, in justification to an action of trespass, prescribed for common over the place in which, &c.; but it appearing, on special verdict, that a part of the right of common had been released by the defendant's ancestor, the plaintiff had judgment, because the prescription was general, and a portion of it failing, the whole fell to the ground. In the present case, a grant is pleaded, but this stands on the same footing with a prescription. Lord Kenyon lays it down in *Morewood v. Wood*, 4 T. R. 157, that the defendant, having prescribed for a right in two commons, must prove the whole prescription; and the [*103 same doctrine was maintained by the Court in *Rogers v. Allen*, 1 Campb. 313. [Lord TENTERDEN, C. J. In *Morewood v. Wood* the Court said the defendant would be obliged to prove the prescription in both the places named; but it does not follow that he must have proved it as to every part of each place.] The defendants here might have confined their justification to so much of the trespasses as related to the part really within the allotment; but they take upon them to assert that the whole place described in the declaration is subject to the easement claimed. It would lead to great inconvenience if an allegation of this kind could be divided according to the result of the evidence; for the record in such a cause would be of little or no value in a subsequent litigation unless explained by proof.

Lord TENTERDEN, C. J. The opinions of the Court in *Richards v. Peake*, 2 B. & C. 918, go the whole length of this case; and if, as it has been urged, we are to look to convenience, I think that is on the side of the defendant. The declaration charges the commission of trespasses, by digging the soil and otherwise, in a close of the plaintiff, which it describes. The plaintiff was not obliged, in support of this declaration, to prove trespasses committed in every part of the close. The defendant pleads that that close is part of certain ground which was once waste, but was set out under an award for particular purposes, and that he is a person entitled to use it for those purposes. It appears that the whole [*104 *extent of ground mentioned in the plea was not set out under the award; but it is also shown that part of it was, and that the place where the alleged trespasses occurred was within that part. The defendant then has proved his justification in the place in which, &c. If the plaintiff was not bound to carry his proof of trespasses to every part of the close mentioned in the declaration,

the defendant was not bound to support his justification as to all parts. It is said that the record, under these circumstances, will not be decisive evidence in a future action, nor will it as to the whole land in question; but either side may show by evidence what part it was that was affected by the result of this cause. And if the objection which has been taken for the plaintiff were to prevail, it would lead to great inconvenience on trial, where pleas of this nature have been pleaded, and such causes would often be decided on points of form, and not on those really in question.

LITTLEDALE, J. The record would be evidence of a former decision as to part of the place in dispute, and it must be shown by proof which part that was. If this imposes any hardship on a plaintiff, it may as well be said, on the other hand, that a defendant is subjected to hardship, because a plaintiff may recover by proving a trespass committed in any part of the close mentioned in his declaration; since that declaration, unexplained by evidence, would be conclusive against the defendant afterwards as to the whole close. I think the allegation here, that the close in which, &c., was part of the allotment, was strictly proved; for "the close in which, &c.," was applicable to any part of the land within the bounds stated in the declaration, in which the plaintiff might show a *105] *trespass actually committed. *Stevens v. Whistler*, 11 East, 51. In *Hawke v. Bacon*, 2 Taunt. 156, the question, whether the plaintiff could have recovered on proof that a part of the land mentioned in the replication had not been enclosed twenty years, was not regularly before the Court: if it had, it is not clear that the decision would have been such as has been suggested in the argument for the plaintiff. *Rotherham v. Green*, Cro. Eliz. 593, *Morewood v. Wood*, 4 T. R. 157, and *Rogers v. Allen*, 1 Camp. 313, were cases of prescription: in *Harpur v. Painter*, 1 Saund. 268, n. 1 (and see 269, n. (h)), where the question related to a freehold, and the defendant pleaded that the locus in quo was parcel of a large waste, the soil and freehold of B., and justified as his servant, the plaintiff replied, that the locus in quo was the soil and freehold of P., and not of B.; and the court held, that the replication, thus narrowing the question raised by the plea, was good.

TAUNTON, J. It is clearly held in *Richards v. Peake*, that "the close in which, &c.," does not mean the whole close referred to in the declaration, but the place in which the trespass is proved to have happened, and the defendant may so apply it. Here trespasses were proved in one part of the close only, and the defendant established his right in that part.

PATTESON, J. The description given in the declaration is merely for the purpose of identifying the close which is the subject of action. When the trespasses *106] are stated, the words "in the said close" do not mean *every part of the close; and the plea must be understood in an equally confined sense.

Rule discharged.

CROSS and Another v. EGLIN and Another.

Plaintiffs agreed to purchase of defendants "about 300 quarters, more or less," of foreign rye shipped on board the A. E. at Hamburgh, at a certain price, subject to the vessel's safe arrival with the goods on board, and being unsold at Hamburgh. The ship brought 350 quarters, and defendants refused to deliver any part unless plaintiffs would accept the whole. The plaintiffs abandoned the contract, and brought an action to recover back a sum of money which they had paid for 300 quarters:

Held, by Lord Tenterden, C. J., and Littledale, J., that by the words "about," and "more or less," the parties could not be taken to have contemplated so large an excess as fifty over 300 quarters; by Parke, J., and Patteson, J., that at all events it lay on the defendants to show that such an excess above the quantity named was in contemplation; and if from the obscurity of the contract they were unable to do so, their defence failed.

Seemle, that evidence of mercantile men as to the effect of the words "about," and "more or less," in such a contract, was not admissible.

ASSUMPSIT. The declaration contained the common money counts. Plea,

the general issue. At the trial before Parke, J., at the York Spring assizes, 1830, it appeared that the following contract between the plaintiffs and defendants was signed by a broker for both parties.

"Hull, 28th of January, 1829. Sold for Messrs. Eglin and Saunderson, to Messrs. William Cross and Co., about 300 quarters (more or less) of foreign rye of good merchantable quality, shipped on board the Anna Elizabeth, Captain P. B. Groot, at Hambro', at 38s. 3d. per quarter. Also about fifty quarters of foreign red wheat, of good and merchantable quality, per same vessel, at 72s. per quarter; both delivered in the like good condition, imperial measure, into bond at Hull, free of port and all other charges save king's duty, and subject to said vessel's arrival at this port with the goods on board, and being unsold at Hambro'; if otherwise, the buyers to be immediately advised. To be paid for by the buyers' acceptance payable in London at three months from date of invoice and delivery."

*The Anna Elizabeth arrived at Hull with 345 quarters of rye and ninety-one of wheat. The plaintiffs allowed the defendants to draw upon [*107 them for the value of fifty quarters of wheat (as to which no dispute arose) and 300 quarters of rye; but they declined accepting the surplus quantity. The defendants kept back the whole of the grain, insisting that the plaintiffs ought, under the contract, to receive the 345 quarters of rye; and the plaintiffs, after making a formal demand of the 300 quarters of rye and fifty of wheat, gave notice that they abandoned the contract. The bill drawn upon the plaintiffs having been paid, this action was brought to recover back the amount. Evidence was offered on the trial, that where the words "more or less" are used in a contract for grain, it is contrary to the custom of merchants to require the purchaser to accept so large an excess over the amount specified as was offered by the defendants. The evidence was objected to; but the learned Judge received it, giving leave to the defendants to move to enter a nonsuit. The jury found for the plaintiffs. A rule was afterwards obtained calling on the plaintiffs to show cause why the verdict should not be set aside and a nonsuit entered, or a new trial had, on the ground that the evidence had been improperly received.

F. Pollock and *Knowles* showed cause in Hilary term. The evidence was rightly admitted. It is true that the construction to be put upon a contract is matter for the Court, but the meaning and effect of a particular mercantile term in it must be ascertained from witnesses conversant with the subject. It was so held in *Lilly v. Ewer*, Doug. 72, where the question turned upon the effect of the words, "sailing with convoy;" *Chaurand v. Angerstein*, [*108 Peake, N. P. C. 43, where the words were, "to sail in the month of October;" *Anderson v. Pitcher*, 2 B. & P. 164, as to a warranty to sail with convoy; *Birch v. Depeyster*, 4 Campb. 385, as to the "privilege" of the master of an East Indiaman; and *Taylor v. Briggs*, 2 C. & P. 525, where the term was "cotton in bales." Supposing the words "more or less" here, which are mere surplusage, to have been omitted, the jury would then have had to ascertain, on a contract for "about" 300 quarters of grain, what was a reasonable limit according to the nature of such transactions. If, however, the question be one of law, still the plaintiffs must recover; for the Court will not hold, that on a contract for a given quantity of grain, more or less, the purchaser may be called upon to take an indefinite quantity.

J. Williams and *Archbold*, *contrd.* The authorities cited only show that explanatory evidence is admissible where there is a clearly established mercantile usage with respect to the application of certain terms. That may be either where the terms themselves are peculiar, or where some particular sense is attached to them beyond that which they bear in common discourse, as in the case of "sailing with convoy," or "cotton in bales." But unless that distinctly appear, the Court will not allow the terms of a written contract to be added to or taken from by parol evidence. *Yates v. Pym*, Holt N. P. C. 95; 6 Taunt. 446. Here no particular usage is shown with respect to the words *"more or less," or "about;" and the Court is as well [*109

able to judge of their effect as the jury. Taking the agreement, then, in the ordinary acceptation of the words used, it amounts to a contract for the contents of the ship *Anna Elizabeth*, and the expression "more or less" refers to the uncertain extent of the shipment. The quantity is not indefinite; for, at all events, the capacity of the ship furnishes a limit.

LORD TENTERDEN, C. J. I think it is immaterial whether this evidence was properly received or not. If it was correctly received, the verdict is right; if not, it is for the Court to put their construction on the contract; and my opinion is, that the excess of quantity in this case was greater than the terms of the agreement warranted. It is said that the effect of the words "more or less" was limited by the capacity of the vessel mentioned; and if any expression had been used, importing that the plaintiffs were to receive all that could come by that vessel, or the whole cargo of that vessel, the suggestion might have had great weight. But this is left quite uncertain: the parties may have meant all that could come by the *Anna Elizabeth*, or all that the correspondent of Eglin and Sanderson could send by that ship, some part of it being filled with the goods of other persons; or they may have meant the remainder of the cargo after part had been sold. The terms are so uncertain, that I can see no other limit to the excess of quantity than such as we may put upon it by our construction; and we think that limit is to be placed at less than forty-five quarters.

*110] *LITTLEDALE, J. There is nothing to show that a contract for the whole cargo was intended. The parties might easily have fixed the precise amount to be purchased; but the meaning probably was, that if the quantity came to anything near that which had been named, and there was a little excess, the plaintiffs would not inconvenience the defendants by leaving it upon their hands. In construing a conveyance or devise of land, if any ambiguity arises as to the thing which is to pass, it is usual to take as a guide the first description of the subject-matter. The first description here, of the thing to be purchased, is 300 quarters of rye: if it had been meant that the whole quantity on board the ship was to be taken, probably something to that effect would have been found in this part of the contract. With respect to the evidence, I think there is considerable doubt whether it was admissible: it is true such evidence is often received to explain mercantile terms; but "about," and "more or less," seem to be words of general import, and I should have much difficulty in saying that evidence ought to be received to ascertain their meaning. But if the Court is to say whether the excess in this case went beyond the real meaning of the contract, I am of opinion that it did. When land is described in conveyances, it is often mentioned as containing so many acres and roods, "be the same more or less;" but it is always understood in those cases that the excess bears a very small proportion to the amount named, a much smaller proportion than that of forty-five quarters to 300. I therefore think the plaintiffs were not bound by their contract to accept the additional quantity, and were entitled to recover back the money they had paid.

*111] *PARKER, J. I have had some doubts on this case; but I think the defendants have made out no right to insist on the plaintiffs taking the whole of this quantity of grain. The contract is to take the cargo, or a part of the cargo, shipped on board a particular vessel coming from *Hamburg*. As the precise quantity is not mentioned in the agreement, the parties must have contemplated some other criterion of the amount that was to be purchased. If this criterion could be ascertained, the words "more or less," and "about," would merely leave the question between the parties where it was; and unless there had been any fraudulent misrepresentation, the one would be bound to deliver, and the other to receive, the quantity shown to have been actually in contemplation. I cannot help thinking that the whole amount of the cargo must have been the criterion intended; for the parties would otherwise have described the quantity more precisely. But they may have meant the whole that the defendants were authorized to sell, or had of their own, or that had not been sold to other persons. The quantity intended should have been clearly expressed:

here, by the terms used, it is left in obscurity; and on that ground I think the defendants cannot succeed. The plaintiff has advanced his money on the faith of a contract for the delivery of goods, and he claims it back on a failure in the performance of such contract: the defendant then is called upon to show that, as far as lay in him, it was fulfilled; and as no criterion has been given, further than the words "about 300 quarters, more or less," for ascertaining how much was to be delivered and received in execution of the contract, the defendants must suffer the consequence of this obscurity. Although, therefore, I still doubt whether the meaning *was not that the whole contents of the ship were to be purchased, I think, under the circumstances, the plaintiffs must [*112 retain the verdict.

PATTESON, J. I also have had some doubts on the construction of this contract; but as we cannot ascertain what the criterion was by which the parties meant the quantity to be settled, we can only look to the amount actually stated; and as the defendants are seeking to fix the plaintiffs with the purchase of a quantity exceeding that, it lies on them to establish that that larger quantity was contemplated in the contract. But failing to do this, through the obscurity of the instrument, they cannot enforce their claim; and the plaintiffs are entitled to recover back what they have advanced. Rule discharged.

FLIGHT v. CHAPLIN.

A. at B.'s request advanced him 200*l.*, and took his warrant of attorney for payments as follows: 100*l.* at Christmas 1829, if both should be then living; 100*l.* at Midsummer 1830, if both should be then living; and 100*l.* at Christmas 1830, on the same condition. Judgment being entered up for the last 100*l.*, and a motion made to set it aside, as grounded on an evidently usurious contract: Held, that this did not sufficiently appear to warrant the interposition of the Court.

MANNING had obtained a rule, calling on the plaintiff to show cause why the judgment and execution in this case should not be set aside on payment of the legal interest on 200*l.*, and costs. It appeared that in May 1829 the defendant applied to the plaintiff to lend him 200*l.*: the plaintiff consented; and the defendant afterwards gave him a warrant of attorney for the payment of 300*l.* by three instalments, on the following terms; viz., 100*l.* to be paid on Christmas day then next, if both parties should be then living; the further sum of 100*l.* *on Midsummer day, 1830, if both should still be living, and 100*l.* more [*113 on Christmas day 1830, if both should be living at that time. The judgment was entered up, and execution issued, for the last 100*l.*, the two other instalments having been paid, and both parties having survived Christmas day 1830. The rule was obtained on the ground that the contract above stated was merely a colour for usury. In answer to this the plaintiff swore that he considered the transaction to be a fair risk of his money; that his own life was bad, and had been rejected at two insurance offices in the preceding year; that the defendant's life was also subject to hazard, he being an officer in the army, and liable to be called into active service; that he, the plaintiff, frequently laid out his money on such risks, having no person to provide for after his death; and that contracts of this kind, where a sum of money is hazarded to produce a larger sum than principal and interest, if a certain event happen one way, and to be lost if it turn out the other, were, as he understood, often entered into in the city of London.

Sir *James Scarlett* and *Channell* showed cause in Hilary term. This bargain was in the nature of a post obit bond, which is not illegal, however hard the terms may be. *Chesterfield v. Janssen*, 1 *Atk.* 301, in which all the cases bearing on this subject were reviewed, shows, that where money is advanced on a real and fair contingency, a contract of this kind is not usurious. The principal here was in jeopardy, and the risk considerable. The statement that this is

*114] a common way of *doing business in the city, becomes material when the question is, whether the contract stated was a real one, or only a colour. The mere circumstance of the defendant's having asked for a loan in the first instance, is unimportant; the contract ultimately made must determine the real nature of the transaction.

The *Attorney-General* and *Manning, contrd.* The question is, whether this was substantially a risk of a sum of money, or a consideration stipulated for the forbearance of it. If the Court, being in the situation of a jury, can plainly see on the face of this transaction that it is merely a colour for usury, they will at once set aside the security, as in the case of annuities, where they prove to be merely loans disguised under that form to evade the law. The defendant's being an officer can weigh little in a time of peace, and there is no doubt that the lives of both these parties might have been insured till the time of repayment for much less than the difference between 5 per cent. interest on the sum advanced, and 100%.

Lord TENTERDEN, C. J. We do not think this a case in which the Court can interfere. There certainly was a risk of the principal. The contingency was if *either* of the parties happened to die. The rule must be discharged.

The rest of the Court concurred.

Rule discharged.

*115] *The KING v. The Master and Wardens of the MERCHANT
TAILORS' COMPANY.

The Court will not grant an application by members of a corporate body, for a mandamus to inspect the documents of the corporation, unless it be shown that such inspection is necessary with reference to some specific dispute or question depending, in which the parties applying are interested; and the inspection will then only be granted to such extent as may be necessary for the particular occasion.

Where members of a corporation, merely alleging grounds on which they believed that its affairs were improperly conducted, and the officers unduly chosen, and complaining of misgovernment in some particular instances not affecting the parties themselves, or any matter then in dispute, applied for a mandamus to the master and wardens to allow them to inspect and take copies of all records, books, and muniments in the possession of the master and wardens, belonging to the company or relating to its affairs, the Court discharged the rule with costs.

A RULE was obtained in Michaelmas term, calling on the master and wardens of the company of Merchant tailors, in the city of London, and John Bamber de Mole, gentleman, their clerk, to show cause why a mandamus should not issue commanding them to permit and suffer John Norman, Charles Fox Smith, Robert Hugh Franks, and two other persons named in the rule, or any of them, assisted by William Henry Ashurst, gentleman, their attorney, and agents, from time to time, at all seasonable times, to inspect and take copies of all records, books, papers, and muniments belonging to the said Company, or relating to the affairs thereof, which were in the possession, power, or control of the said master and wardens, and clerk, or any or either of them.

The rule was obtained on the affidavits of the said C. F. Smith, R. H. Franks, and J. Norman, in which it was stated that the deponents had been freemen and liverymen of the company, respectively, for eleven, ten, and twenty-one years last past; that the company was an ancient corporation, and possessed of great revenues, partly arising from the contributions of freemen and liverymen of the company, for the promotion of religion and education, the relief of the poor

*116] members, and other charitable purposes: that the attention of the *deponents had for a considerable time been called to the affairs of the company by reports, which they believed to be well founded, that the revenues were misemployed through malpractice on the part of those members who had the management of the company's affairs: that the fine for admitting freemen to the livery had been twice raised since 1810, without any corresponding increase (as

the deponents were informed and believed) in the pensions and charitable disbursements of the company; that a lavish expense had taken place (some instances of which the deponents alleged to be within their own knowledge), unsanctioned by the majority of the members of the company: that a clerk of the company had (as the deponents had heard and believed) within the last few years misappropriated funds of the company to a large amount, but that no accounts or information had been laid before the freemen and liverymen by which they could learn the amount of such defalcation, nor could they ascertain, unless allowed to look at their charters, by-laws, books, muniments, and documents, whether such their common funds were properly applied and accounted for or not.

The affidavits then stated various applications made during the last three or four months by the deponents, in concert with other freemen and liverymen of the company, to the master and wardens, and to the clerk of the company, for an inspection of the charters and by-laws, which was finally refused, it being at the same time stated on behalf of the master and wardens, that if any of the livery wished for an interview with the master and wardens, or with them and the court of assistants, to communicate to them anything respecting the *com- [*117] pany or its affairs, a request to that effect would be complied with.

It was further alleged in these affidavits, that the election of master and wardens was not made by the company at large, but by the master, wardens, and court of assistants, which last-mentioned court was composed of liverymen, elected as vacancies occurred, by the master, wardens, and court of assistants themselves; whereas the election of master and wardens, by a charter of Richard II., belonged to the whole company, and not to any select body. That the court of assistants, with the master and wardens (amounting in all to only thirty-nine persons), exclusively managed the affairs of the company, and were alone permitted to see the accounts, records, or ordinances of the company; and that the members of the said court of assistants were, as the deponents believed, chosen by favour.

It was also stated, that on the admission of the deponents to be freemen, they were sworn to observe certain regulations of the company, and that part of the oath was as follows:—"And all other good rules and ordinances made and to be made, not repealed nor reversed, you shall obey, keep, and maintain, to your power, as near as God will give you grace." And on their admission to be liverymen, a part of the oath administered was in these words, "You shall keep to your brother all the lawful ordinances and acts now ready made within your said fraternity as far as shall concern or belong to your charge."

The deponents alleged that they had no other wish in desiring the inspection of the said charters, by-laws, and other documents, than to see, on behalf of a body *of the members, by whom they were authorized, how their joint funds were disbursed, and that the legal rights and privileges of the mem- [*118] bers of the company were enjoyed by them agreeably to their charters.

The affidavits in answer were sworn by the clerk, the master, and several of the wardens, and the accountant of the master and wardens. They stated that the company was a corporation as well by prescription as by charters of several kings; and they referred in particular to a charter granted by Henry VII., by and with the advice and consent of the lords spiritual and temporal in parliament, to the then master and wardens of the fraternity of tailors and armourers of linen armoury of St. John the Baptist, in the city of London, and their successors, which is now the governing charter of the company. By this charter the king incorporated, confirmed, and translated the said master and wardens and their successors, by the name of the master and wardens of the Merchant tailors of the fraternity of St. John the Baptist, in the city of London, and empowered them and their successors from time to time to increase, and admit members into, the said fraternity. And the lands, tenements, and property of every description, and all liberties, franchises, privileges, and grants which the said master and wardens, or their successors, or the men of the said mysteries, had before held were thereby granted to the said corporation of the master and wardens and their successors by their own name, and they were in and by that name authorized to

purchase and alien lands and possessions, to sue and be sued, and to make statutes and ordinances for the good government of the said mysteries, and of the men of the said fraternity, when necessity should require. By the same charter, *119] the *guild or fraternity was in like manner incorporated anew, and by virtue of that and former charters, the members of the said fraternity as such, and by becoming freemen or liverymen of the same, are entitled to, and enjoy, many benefits and privileges in the city of London, and also become liable in the matters provided for by the charter and by legal by-laws from time to time made, to the control and government of the corporation of master and wardens.

It was further stated, that from the date of the earliest documents down to the present time (a period of more than 340 years), there has always been a body called assistants, elected from the liverymen and freemen, and that the elections both of master and wardens, and of assistants, appear always to have been made and conducted as at present, the freemen and liverymen not interfering. Circumstances were also adduced to show that the elections of assistants had not, as alleged on the other side, been influenced by partiality.

It was further sworn, that the master and wardens (but not the fraternity) possess property to a large amount, principally bequeathed to them by former masters, wardens, and members of the court of assistants, part of which was left to their absolute disposal, and part for specific purposes, some of which are wholly unconnected with the fraternity: and they also receive fines from freemen taking up their livery, and liverymen elected to the court of assistants. The affidavits then went into a particular statement respecting the company's revenues and their application, contradicting in detail the affidavits on the other side. With respect to the fines on freemen taking up their livery, they stated that the *120] master, wardens, and court of assistants *possessed, and had frequently from the earliest periods exercised, the power of varying the amount of such fines; and that taking up the livery was now an act wholly voluntary, whereas freemen were formerly required to do it if of sufficient ability; and they explained the application of the fines at present imposed, as well on this occasion as on elections to the court of assistants. They stated, that, as far as appeared from the company's records, the accounts of the master and wardens had always been audited by a committee of the court of assistants, who reported to the master, wardens, and court, and that no interference of the freemen or liverymen had taken place, except, as it appeared, in one instance before the charter of Henry VII.: that the said accounts continued to be strictly audited, and due reports made, according to ancient custom: and that the loss sustained, as alleged on the other side, by the default of one of the company's servants, had been borne wholly by the corporate fund of the master and wardens.

It was denied that any right appeared ever to have been claimed or exercised by the freemen or liverymen of examining or taking copies of the records, books, or muniments of the master and wardens, except as after mentioned, and except as regarded the books of registration of apprentices and freemen, from which it was customary to grant extracts of specified names and particulars to individuals applying, on payment of a fee. Some liverymen had, in 1752, desired to inspect and take copies of the by-laws; and the master and wardens, upon a case laid before Sir Dudley Rider, then attorney-general, were advised, on that occasion, *121] not to grant the request; but in order to avoid a threatened litigation *before the court of the lord mayor and aldermen, they did at that time grant a limited permission, with an express reservation of their right to withhold it in future. And the affidavits stated, that it would be most inconvenient, and productive of great confusion and considerable additional expense, if the right of inspection now claimed were allowed to exist in a body amounting to upwards of 1100 individuals, which is, as nearly as can be ascertained, the present number of the freemen, or even in a body of 340, or thereabouts, the present number of the liverymen, of the said fraternity, exclusive of the master, wardens, and court of assistants.

There were general averments of care, diligence, and integrity on the part of the master and wardens in administering their affairs and those of the fraternity: and the clerk of the company stated that he was informed and believed that the present demand was prosecuted by a small minority of the livery, and that he was also informed and believed from the conduct pursued, that the application was not made *bonâ fide*, but in order to furnish the parties indirectly with materials, if possible, for disturbing the established constitution of the fraternity, and impugning the election of the governing officers.

Sir *James Scarlett*, *Gurney*, *Campbell*, *Coleridge*, and *Robert Scarlett* showed cause in Hilary term. This application is quite of a new kind; it is in the nature of a bill of discovery to ascertain whether or not there may be grounds for a *quo warranto* against some person, there being, at the time, no such proceeding commenced. The distinct incorporation of the master and wardens, *stated in the affidavits in answer to the rule, is no extraordinary [*122 institution, but is found in many guilds. The applicants in this case do not advance any specific objection or claim; they merely say that they believe certain parties are not duly elected to the offices they hold, and that they should find proofs of it if the Court would grant a *mandamus*. The Court will not allow the writ to go on mere surmise, for the purpose of shaking titles at present unimpeached.

The Court here called upon

F. Pollock and *Hill* in support of the rule. There is no authority against this application. It cannot be maintained that the master and wardens shall raise money from the company and refuse them all information as to their affairs. This Court surely has a discretionary power, under the circumstances that have been stated, to grant a *mandamus*, in order that the body at large may see how the fines levied upon it are disposed of. And as to the property in general, if vested in the master and wardens, it can only be so in trust for the whole fraternity. Besides, in this case the freemen and the liverymen are sworn to keep all rules and ordinances made and to be made within the fraternity, and they cannot know the nature and effect of these without an inspection of the company's records and documents. The authorities as to the right of inspecting documents of this kind are collected in a note on *Rex v. The Fraternity of Hostmen in Newcastle-upon-Tyne*, 2 Stra. 1223. In that case the Court said, "That every *member of the corporation had, as such, a right to look into the books for any matter that concerned himself." In *Rex v. Babb*, 3 T. R. [*123 579, Lord Kenyon says, "For the purpose of the argument it may be admitted, that in certain cases the members of a corporation may be permitted to inspect all papers relating to the corporation;" though in that case the claim to inspect was considered as limited by the subject-matter. And *Ashhurst, J.*, there says, that if a corporator has a general right of inspection, he may apply, at any time, and not wait till there is a cause in the court before he makes that the ground of his application; only, if he apply for a general inspection of all papers merely on the ground of his having an interest in them as a member of the corporation, he must shape his application accordingly. It may be admitted that a member of a corporation may not be entitled to a *mandamus* for the discovery of all documents relating to its affairs, as in the case of the Bank of England accounts, *Rex v. The Governor, &c., of the Bank of England*, 2 B. & A. 620; but here the parties only seek to know the extent of their own rights and duties as full brothers of this fraternity. If there are any documents that relate to the master and wardens exclusively as such, they can be kept back: it is not sworn that there are none which concern the company in general. In the cases where copyholders have applied for a *mandamus* to inspect and take copies of the court-rolls, this Court has granted the application without waiting for a suit to be commenced. *Rex v. Lucas*, 10 East, 235, *Rex v. Tower*, 4 M. & S. 162.

*Lord TENTERDEN, C. J. Since I have had the honour of a seat on this bench, I have always thought that the power and authority of the [*124 Court were limited by the practice of our predecessors, and I have been anxious

not to assume or be a party to assuming any authority for the exercise of which I could find no precedent. For this reason, when my attention was called to the terms of the present rule, which demands an inspection, and liberty to take copies, of all records, books, papers, and muniments belonging to this company, or relating to its affairs, I asked early in the discussion, if there were any precedent for granting a mandamus under such circumstances, my general recollection being that there was not, but that in all the cases where a mandamus had been granted, the application had been limited by some legitimate and particular object, in which the party had an interest. The cases which have been cited are no authority for this application: reliance has indeed been placed on some expressions of a general nature occurring in them; but general words, whether uttered by a Judge in court, or spoken elsewhere, or published in a treatise, must, on sound principles of logic and criticism, be limited to the subject-matter on which they are employed: the attempt to carry them further only leads to error. In *Rex v. The Hostmen of Newcastle*, 2 Stra. 1223, a question was depending as to the right of a party to be admitted into the company, and it was material to ascertain whether the master whom that party had served, had been admitted to his freedom in the corporation at large; a rule was prayed for

*125] generally on his behalf, to *inspect the corporation books, and the Court said that every member of the corporation had, as such, a right to look into the books for any matter that concerned himself, though in a dispute with others; but they limited the rule to the book wherein admissions of freemen were entered. And so I believe in all the subsequent cases of the same kind, it will be found that the mandamus has been limited to the inspection of particular documents which related to a subject then in discussion, and in which the party applying had an interest. In *Rex v. Tower*, which was the case of a copyholder, there was indeed no suit depending, but what were the facts? A distinct controversy had arisen between Lord St. Vincent, as tenant of a manor, and the defendant, as lord, on a particular subject, the cutting of underwood. On the Earl's application under these circumstances, the Court granted a mandamus to inspect the court-rolls, so far only as related to that subject. Lord Ellenborough there said, "The copyhold tenant claims a right to the underwood, against which the lord sets up a counter-right, and the lord has the custody of the muniments which contain the evidence of the manorial rights. And shall he, who is a trustee and guardian of the evidence of the tenants' rights, lock it up from them, and in a matter too where his own interest is in question? I do not see upon what principle of justice that is to be done." There are many instances of applications by copyholders, some, I believe, in which no suit has been depending, where questions have arisen as to the course of descent, or to customs

*126] within the *manor, in which the party has shown himself to have a particular interest, and the Court has granted a mandamus to inspect the court-rolls, so far as related to the matter immediately in question; but I do not know that any case can be mentioned which goes further. In *Rex v. Allgood*, 7 T. R. 746, a freehold tenant of a manor applied for a mandamus to enable him to inspect the court-rolls and take copies of them, merely stating in his affidavit that he was such freehold tenant, that he had occasion to inspect the court-rolls, and that the inspection had been denied him. But the Court there were of opinion that unless there were some cause depending, the tenant had no right to call for the inspection, and they observed that in each of the cases cited in support of the rule, (a) there was some cause or proceeding instituted. The party there did not show any particular occasion with reference to which the inspection should be granted, and the Court refused to interfere. There appears, therefore, to be no instance in which a rule has been granted like that now applied for.

The object of the present application is an inspection of all documents. It is contended that that liberty may be claimed at any rate as to some; those particularly which regard the funds of the company. And it is said, admitting that

(a) *Rex v. Shelley*, 3 T. R. 141, and other cases there referred to.

those funds are vested in the master and wardens, they can only be vested in them as trustees for the fraternity. Be it so; this is not a court in which a cestui que trust can call upon his trustee for an account, or an inspection of deeds. Again, it is said that the fines now exacted on the admission of liverymen *form a ground for this application. As far as I have means of [*127 judging, the persons who pray for this rule must all have paid those fines already. If they are exorbitant, and a party applying to take up his livery is refused admission unless he will pay such exorbitant demand, there a particular grievance arises, and the party may apply to this Court; in such a case there would be good ground at least for a rule to show cause; I do not say what would be the result of the application, but it would be in the ordinary course. Then it is said the terms of the oaths taken by freemen and liverymen of this company form a reason for granting an inspection of the ordinances to which the oaths refer. I do not say that, if a distinct application were made to the company for an inspection of those ordinances, and were refused, this Court would deny a mandamus; that case is not now before us; but the opinion of the Court on the matter at present in question would be no reason for refusing such a rule. The ground of our present decision is, that there is no instance of such an application as this having been granted. Nor can I see any good reason for allowing particular members of a body corporate to inspect every document belonging to such body. I am sure it would lead to great inconvenience and much expensive litigation. The rule must, therefore, be discharged.

LITLEDALE, J. I am of the same opinion. The master and wardens, who have the care of the documents in question, are bound to produce them if a proper occasion is made out, in a matter affecting the members of the corporation. But I think the members have no right on speculative grounds to call *for [*128 an examination of the books and muniments, in order to see if by possibility the company's affairs may be better administered than they think they are at present. If they have any complaint to make, some suit should be instituted, some definite matter charged; and then the question will arise whether or not the Court will grant a mandamus. The language of the Court in *Rex v. The Hostmen of Newcastle*, 2 Str. 1223, "that every member of the corporation had, as such, a right to look into the books for any matter that concerned himself," must be taken with reference to the case then before the Court. A proceeding was there instituted in which the party applying was concerned; a necessity for the inspection was pointed out; and the Court confined the rule to the particular book to which the necessity applied. It has indeed been held that the lord of a manor was bound to produce the court-rolls even where there was no legal proceeding instituted; but the reason of this is, that the lord has the custody, as a trustee, of the title deeds and documents which show the rights of each particular tenant, instead of their being allowed the custody of their own muniments; every one, therefore, has a claim, on any dispute with the lord, or question otherwise arising with regard to his own estate, to resort to the court-rolls for the purpose of seeing how the admissions have gone on former occasions on the particular estate, what are the customs of the manor affecting it, and whether he enjoys the privileges properly belonging to it: it is convenient that the evidences of titles and customs should be kept in one place, but it would be unreasonable if the tenants had not recourse to them. *But even in the case of court-rolls, the tenant has not a right to inspect all the titles; it would be [*129 extremely inconvenient if he could do so; and it would also be very inconvenient in a corporation if every member could inspect all the books without a definite view to any right or object of his own. If the master and wardens here have been improperly elected, the parties moving for this rule may apply for a quo warranto, but I think they have no right to call for an inspection of the books merely to see whether they can then find any ground for further proceedings.

TAUNTON, J. I also think this rule must be discharged. It appears to me that if the members of every corporation had a right on mere speculative grounds to call upon the governing part of the body for an inspection of all the records,

books, and muniments belonging to it, the consequences would be endless confusion and inconvenience. It is admitted that no case can be found in which an application like this has been successfully made; and in the absence of authorities, I think this court ought not to establish such a precedent. There is no express rule that to warrant an application to inspect corporation documents there must actually have been a suit instituted; but it is necessary that there should be some particular matter in dispute, between members, or between the corporation and individuals in it; there must be some controversy, some specific purpose in respect of which the examination becomes necessary. If in making this application, any such purpose could have been pointed out, the parties also showing that they had an interest in the matter in question, the rule might have *130] been granted. And the *present decision will not prevent our granting a remedy in future, if any particular grievance should be stated, and the parties interested, after applying without success to the corporation for a view of documents tending to throw light on the subject in dispute, should come to this court for a mandamus. The application might then be granted consistently with the usage of the Court: in the present instance it cannot.

PATTESON, J. I am also of opinion that the rule must be discharged, and I come to that conclusion from the generality of its terms. I am far from saying that there may not be particular instances in which a corporator may apply for a mandamus to inspect documents, or some of them, of the kind here mentioned, if he can show a specific ground of application, and that the granting of it is necessary to prevent his suffering injury, or to enable him to perform his duties. But he must state a definite object; and here that is not done. It is admitted that the master and wardens are the governing part of this company: if they are trustees for the rest of the members, and have abused that trust, this Court is not the jurisdiction to which abuses of such a kind are to be referred. It seems to me that the application is a great deal too large in its terms, and must therefore be dismissed.

Lord TENTERDEN, C. J. The rule must be discharged with costs, because where parties make an entirely novel application, in which they fail, they ought to pay the expense of it. Rule discharged with costs.

*131] *DILLON and SPENCE, Assignees of JEFFERSON, a Bankrupt v.
The Honourable MARMADUKE LANGLEY.

A sheriff seizing under a *fi. fa.*, and afterwards selling, the goods of a person who has committed an act of bankruptcy, is liable in trover to the assignees (under a commission issued within two months), though it do not appear that at the time of seizure, or when the sale began, the sheriff knew of the act of bankruptcy.

TROVER for goods. Plea, not guilty. At the trial before Lord Tenterden, C. J., at the Middlesex sittings after Michaelmas term 1829, a verdict was found for the plaintiffs for 810*l.* damages, subject to the opinion of this Court upon the following case:—

Richard Jefferson, a person carrying on business at Pickering, in Yorkshire, executed a warrant of attorney to confess judgment at the suit of George Wilson (who was originally made a defendant in the present action, but died while it was depending) for 3000*l.* On the 11th of September following Wilson signed judgment. On the 13th or 14th of the same month Jefferson committed an act of bankruptcy by a denial to a creditor. On the 16th Jefferson's goods at Pickering were taken in execution upon the judgment, by the warrant of the defendant Langley, then sheriff of Yorkshire, which warrant was dated on the 15th of the same month. On the 23d of September notice was given on behalf of the creditors, to the officer in possession of the goods, that a docket had been struck against Jefferson, and a commission was about to be opened. The commission was issued on the 4th of October; on the 13th Jefferson was declared a bankrupt; and on

the 26th the plaintiffs were duly chosen assignees. The under-sheriffs wrote to the officer on the 16th of October, informing him that they had received notice of Jefferson having been declared a bankrupt, and that the provisional assignee *had claimed the property taken in execution. On the 14th of November they wrote to the solicitors for the commission as follows:—“The [*132 mode you suggest of paying the money levied into Court would be satisfactory so far as respected that money, but you will recollect that the levy is not completed, and that the sheriff is in possession of the remainder of the goods seized, and that expense is incurring by keeping possession. If the indemnity can at once be given to him without applying to the Court, the goods as well as the money would be delivered up to the assignees.”—“You will see that the arrangement respecting the goods unsold is material. When we settled with Mr. Harte to take the indemnity of the assignees, we instructed the officer not to proceed in the sale without further instructions.” On the 17th the solicitors to the commission returned for answer, “Jefferson has not yet arrived in town, and we have not that knowledge of his affairs that will enable us to procure you an indemnity from the creditors forthwith. Mr. Capes” (the agent to the under-sheriffs) “agrees with us that it will be desirable that the whole of the property which the sheriff has taken in execution should be converted into cash under the authority of the fi. fa., and that then if the plaintiff rules the sheriff he will be in a situation to pay the money into Court, to await such an indemnity as may prove satisfactory to you. The plaintiff cannot of course complain of your proceeding under the writ to realize the effects; and as we concur in your doing so on the part of the assignees, satisfied that you will direct your officer to realize in the best manner and at the least possible expense, we think you will see no difficulty in the case.”

*In Easter term 1827, Wilson ruled the sheriff to return the writ, whereupon he again applied for an indemnity, which both the assignees [*133 and Wilson declined giving: but the Court of King's Bench, on the sheriff's application, gave him time for returning the writ, until he should be indemnified by Wilson, he, the sheriff, in the meanwhile, bringing the money levied into Court, which was done. No indemnity was ever given. The sheriff's officer was in possession from the 16th of September, 1826, till the 5th of December following, when the sale, which began soon after the levy (the precise day was not stated), and which lasted, at intervals, twenty-three days, was finished. The question submitted to the Court was, Whether, under the circumstances, the plaintiffs could maintain an action of trover? This case was argued in Hilary term by

Holt for the plaintiffs. The action is maintainable. This is not an execution protected by the eighty-first or 108th section of the bankrupt act, 6 G. 4, c. 16, for it was levied after an act of bankruptcy, and within two months before the issuing of the commission. Two points are raised on behalf of the defendant; first, that trover does not lie in this case; and, secondly, that if it did, the tort has been waived by the letter of the 17th of November, and, therefore, that the only remedy for the plaintiffs is an action for money had and received. As to the first point, the goods were taken in execution several days after the act of bankruptcy; and it is now fully established by the case of *Cooper v. Chitty*, 1 Burr. 20, 1 W. Blacks. 65, followed up in the Court of Common Pleas by *Lazarus v. *Waithman*, 5 B. Moore, 313, and *Price v. Helyar*, 4 Bingh. 597, and [*131 in the Exchequer by *Potter v. Starkie*, (a) that under such circumstances, trover lies against the sheriff. As to the other point, the letter of the 17th, coupled with the communication to which it was an answer, cannot be considered as a waiver: part of the goods had already been sold, and the sale of the rest was acquiesced in as a matter of convenience, and to save expense. No consideration appears for a waiver by the plaintiffs of their clear legal right. It cannot

(a) Cited in *Stephens v. Elwall*, 4 M. & S. 260, and (on the authority of *Richardson, J.*) in *Price v. Helyar*, 4 Bingh. 603. See *Hitchin v. Campbell*, 2 W. Blacks. 827, *Smith v. Milles*, 1 T. R. 475.

be said that they have constituted the defendant their agent, for he has never yet admitted their title. (The Court here called upon the other side to support the first point.)

J. Williams, contra. It may still be questioned whether *Cooper v. Chitty* has been rightly considered, in the subsequent cases, as an authority for holding the sheriff liable in trover under circumstances like the present. In *Bayly v. Bunning*, 1 Lev. 173, which was an action of trover against a bailiff for taking goods under a *fi. fa.*, after an act of bankruptcy upon which a commission subsequently issued, the Court gave judgment for the defendant, because "he being an officer was obliged to execute the writ, who could not know of the acts of bankruptcy, or that any commission would ever be sued." In *Cole v. Davies*, 1 Ld. Ray. 724, it is laid down that if a sheriff levies after an act of bankruptcy, and sells, and a commission is granted and the goods assigned, the assignee may have trover against the vendee, but not against the sheriff, because *135] he obeyed the writ. He is *obliged to obey the writ, and ought not in so doing to be liable to consequences which he may have no means of providing against. (a)

Lord TENTERDEN, C. J. He must obey the writ, but he is also required to know whose goods he takes. I think in this case we ought to say that we consider ourselves bound by the many decisions which have taken place, establishing the liability of the sheriff. And I am informed by the Lord Chief Justice of the Common Pleas that a similar opinion was expressed by that Court in a case determined there only three days ago. (b)

LITTLEDALE, TAUNTON, and PATTESON, Js., concurred.

Williams declined arguing the other point.

Judgment for the plaintiffs. (c)

(a) In *Timbrell v. Mills*, 1 W. Blacks. 205, the Court appears to have considered it as allowed in *Cooper v. Chitty*, that if the sheriff levies and pays over the money before commission issued, and without notice of the act of bankruptcy, he will at all events be safe. But see as to this dictum, *Price v. Helyar*, 4 Bingh. 604. In *Lyon v. Lamb* (cited in *Lazarus v. Waithman*, 5 B. Moore, 313), it was urged as distinguishing the case from *Cooper v. Chitty*, that the sheriff had sold before notice of an act of bankruptcy, but the Court of Exchequer held that he was still liable, the property having vested in the assignees by relation. The same ground was taken by the Courts in *Potter v. Starkie*, *Lazarus v. Waithman*, and *Price v. Helyar*; in all these cases the sale, or that which was equivalent, had been completed before commission issued, and in the first and last the money had been paid over before the commission, and before notice to the sheriff of the act of bankruptcy.

(b) *Carlisle v. Garland*, 7 Bingh. 298.

(c) See 1 & 2 W. 4, c. 58, s. 6; and *Austen v. Ward*, Ry. & M. 116.

*136] *The KING v. The Inhabitants of SALWICK.

By the general highway act 13 G. 3, c. 78, s. 64, the Court before which any indictment for non-repair of a road is tried, may award costs to the prosecutor if the defence appear to have been frivolous, or to the defendant, if it appear that the prosecution was vexatious. This section applies only to cases tried in the ordinary course; and where, on an indictment removed by the defendant by certiorari, the Court above had ordered a new trial, and the prosecutor's costs of both trials to abide the event; it was held that this special rule took away the authority of the Judge to certify in favour of the defendant.

THE defendants being indicted at the quarter sessions for Preston, in the county of Lancaster, for non-repair of a road, removed the indictment into this Court by certiorari, according to the statute 5 & 6 W. & M. c. 11. On the trial at the assizes they were found guilty, but a new trial was afterwards moved for and granted upon certain terms, it being ordered by the rule, among other things, that the prosecutor's costs of both trials should abide the event. On the second trial the defendants were acquitted, and Bayley, J., who tried the case, certified that the prosecution was vexatious. A rule was afterwards obtained for taxing the costs to be paid by the prosecutors to the defendants. In Hilary term, *Cross*, Serjt., obtained a rule to show cause why the rule for taxation of costs should not

be discharged, on the ground that the sixty-fourth section of the highway act, 18 G. 3, c. 78, (a) which empowers the Court to certify for costs on an indictment for non-repair of a highway, applied only to cases in the ordinary course, and not to those where, by statute or otherwise, the costs on one side or the other were provided for independently of a certificate.

**J. Williams*, in the same term, showed cause. There is no ground for saying that section 64 of the act does not apply: it is quite general [*137] in its terms, and makes no distinction between indictments tried in the ordinary course and those removed from inferior courts, or coming on under other special circumstances. In *Rex v. Chadderton*, 5 T. R. 272, the indictment had been removed by certiorari, and (as appears on inquiry at the crown office) by the defendant; and the Court there held that the Judge below might have certified on acquittal, though the defendant would have been liable to costs if convicted, by the express provision of 5 & 6 W. & M. c. 11, s. 8.

Cross, Serjt., and *Starkie*, *contrâ*. This is not a case within the meaning of the act. The sixty-fourth section applies only to cases in the ordinary course, where there would be no costs on either side but for the certificate of the Court, and where they may be awarded to one or the other according to the event. But it is not applicable in the case of an indictment removed by the defendant, where by 5 & 6 W. & M. c. 11, such defendant is liable to costs if convicted, and where, consequently, the power of certifying would only be operative on one side; nor to a case like the present, where the costs of one party are the subject of an express compact, embodied in the rule for a new trial, and forming part of terms on which such rule was granted.

Lord TENTERDEN, C. J. It appears to me that the sixty-fourth section of the highway act does not apply *to cases like the present, but to such as [*138] occur in the ordinary course. Here the Court set aside the first verdict, and granted a new trial by a very special rule, in which nothing was said as to the defendant's costs, though a direction was given with regard to those of the prosecutor. The case then did not go to trial under the common circumstances; and I think the provision which the legislature has made for the defendant's costs by means of a certificate was not intended to apply where the case goes down to trial, as in this instance, by an extraordinary interposition of the Court. The rule, therefore, for setting aside the rule for taxation must be absolute.

LITTLEDALE, J. I am of the same opinion. The Court having granted the rule for a new trial in the special terms which have been referred to, the power of certifying was taken away.

TAUNTON, J. It was for the Judges who granted the new trial to shape the rule according to their discretion. By providing as they did in this instance, they left no power to certify.

PATTESON, J., having been counsel in the case, gave no opinion.

Rule absolute for discharging the rule to tax costs.

(a) It enacts, "That it shall and may be lawful for the court before whom any indictment or presentment shall be tried for not repairing highways, to award costs to the prosecutor, to be paid by the person or persons so indicted or presented, if it shall appear to the said court that the defence made to such indictment or presentment was frivolous; or to award costs to the person indicted or presented, to be paid by the prosecutor, if it shall appear to the said court that such prosecution was vexatious."

*The KING v. BLAKE, Esquire.

[*139]

On an appeal to His Majesty's Court of Delegates against a decree of the Prerogative Court, a commission issued to certain persons to hear and determine such appeal; and it was commanded, that in acts to be done in the said appeal before giving a definite sentence therein, two at least of the delegates, but in the pronouncing a definite sentence therein, three at least should be present and consenting, as well in the appeal as in matters of attentates, &c., done since, and in prejudice thereof, and likewise in the principal cause, together with its incidents, emergents, dependents, and things enjoined and connected thereto whatsoever. The appellant was condemned in costs, and two monitions were successively decreed, the first by three, the second by two only, of the delegates, to enforce judgment. These being disobeyed, three of the delegates

pronounced the appellant in contempt for non-payment of costs, after which a significavit, pursuant to 53 G. 3, c. 127, s. 1, was issued by two only of the delegates. The Court here held the significavit to be void, and quashed the writ de contumace capiende issued in pursuance of it.

A RULE was obtained in Hilary term calling on the Reverend Hugh Smith, the prosecutor of a writ de contumace capiende, issued against Lieutenant General Blake, to show cause why the writ should not be quashed. The circumstances were as follows:—General Blake having appealed to his Majesty's Court of Delegates against a judgment of the Prerogative Court in a suit there instituted against him by Mr. Smith, a commission (grounded on the statute 25 H. 8, c. 19, s. 4) was issued to three judges of the common-law courts, and six doctors of civil law, enjoining them to hear and determine the appeal. Part of the direction to the delegates ran in these words:—"We command you that in all ordinary acts to be expedited and done in the said cause or business of appeal and complaint, before the giving or pronouncing a definite sentence therein, all or at least two of you, but that in the pronouncing a definite sentence therein, all or at least three of you, of whom we will and require that you the aforesaid Sir George Sowley Holroyd, Knight, Sir James Burrough, Knight, and Sir John Hullock, Knight, or one of you^(a) shall be present and consenting, as well in this cause of appeal and complaint of nullity in the said appeal deduced, as also *140] in all matters of attentates, innovations, *and things done since and in prejudice of the said appeal and complaint and our jurisdiction, and likewise in the principal cause or business, together with its incidents, emergents, dependents, and things enjoined and connected thereto whatsoever." And that, having heard the parties, "you do adjudge and decree what shall be just and right in the premises, and what you shall so adjudge and decree, that you do by all due means and methods of law cause to be firmly and fully observed."

The delegates affirmed the judgment, and condemned General Blake in costs. On the 19th of June, 1829, at a sitting attended by only three delegates, doctors of civil law, the costs were taxed, and a monition for payment decreed. The costs not being paid, a further process, called a monition by ways and means, was decreed on the 16th of July, by two of the doctors delegates. On the 31st of July, Mr. Baron Hullock, one of the common-law judges of the commission, died. The second monition having been disobeyed, at a subsequent session (November 24th) the three delegates who had made the decree of the 19th of June, pronounced General Blake guilty of contumacy, and decreed that his contempt should be signified according to the statute 53 G. 3, c. 127, s. 1. The significavit to his Majesty in Chancery (dated the 24th of November, setting forth the contempt, and praying that the party might be arrested and imprisoned^(b)) was given in the names of two only of the last-mentioned doctors, and a third not in the commission, styling themselves "judges (amongst others) delegates respectively appointed," under the *above-mentioned commission; *141] and on this significavit the writ issued. In moving for the rule, two grounds of objection to the writ were mentioned; first, that by the death of Sir John Hullock the commission was vacated; and, secondly, that in the proceedings after affirmance of the judgment, civilians only, and in some instances, and particularly in issuing the significavit, not more than two of these had concurred, whereas the commission required the concurrence of three delegates, among whom was to be one of the common-law judges.

Denman, Attorney-General, and *Manning*, showed cause in the same term. As to the first objection, it is enough if a sufficient number of delegates remained to attend in the respective stages of the cause as required by the commission. With regard to the other point, if two delegates might issue a significavit, the naming of a third as joined with them, who was not in the commission, will not vitiate the proceeding. The commission requires three delegates to be present and consenting when a sentence is given; but it does not require the subsequent

(a) Sic.

(b) See 53 G. 3, c. 127, Schedule (A).

proceedings in their whole extent to be followed up by the same authority. It may also be questioned whether the application to quash a writ of this kind *quia improvide emanavit*, ought not properly to be made to the Court of Chancery, out of which it originally comes,^(a) instead of the Court here.

Gurney and Cresswell, contra, mentioned as to this last point *Rex v. Theed*, 1 Stra. 43, where the Court of King's Bench superseded a writ de excommunicato capiendo * (for which process the writ de contumace capiendo is substituted) as having emanated improvide. As to the rest of the case they [*142] were stopped by the Court.

Per Curiam. The writ must be quashed. The commission requires two delegates to concur in acts previous to giving a definite sentence in the cause or business of appeal, but in the pronouncing a definite sentence therein, three at least are to be present and consenting, as well in the appeal as in all matters of attentates, innovations, and things done since and in prejudice thereof, and of the jurisdiction, and likewise in the principal cause, "together with its incidents, emergents, dependents, and things enjoined and connected thereto whatsoever." Surely the question of costs is an incident and emergent of the cause.

Rule absolute.

a) See 53 G. 3, c. 127, s. 1, and 5 Eliz. c. 23, s. 2.

PENNEY v. SQUIER. April 15.

Plaintiff had a demand on defendant for 9*l.*, and owed defendant 21*l.* on a promissory note. They agreed to set off the smaller sum against the larger. Defendant afterwards sued plaintiff on the note in the Spalding court of requests for 5*l.* (the highest sum demandable there), and recovered: Held, that defendant had not thereby waived the agreement, and become liable again for the 9*l.*, though the recovery was in respect of the whole debt on the note, and the local court could not take cognisance of the balance of an account.

ASSUMPSIT for goods sold, &c. Plea, the general issue. At the trial before Lord Lyndhurst, C. B., at the last Spring assizes for the county of Lincoln, it appeared that Mrs. Squier, the defendant, being indebted to the plaintiff in the sum of 9*l.* claimed in this action, and the plaintiff also owing her, as executrix of her late husband, 21*l.* upon a promissory note, payable on demand, it was agreed between them that the lesser sum should be set off against the greater. The balance being unpaid, Mrs. Squier sued the *plaintiff in the court of requests for the hundred of Elloe, in Lincolnshire, for 5*l.* (the highest [*143] demand of which that court takes cognisance), but failed, inasmuch as she claimed the sum as the balance of an account, which, by the act establishing the court, 47 G. 3, sess. 1, c. xxxvii., took the case out of the jurisdiction. She was then called upon on the part of the plaintiff to pay the 9*l.*, but did not do so; and a short time afterwards she again sued the plaintiff in the court of requests for 5*l.*, as due on the note, without adverting to any balance of account, and recovered 5*l.* in full discharge of the 21*l.*, pursuant to the statute. It was contended for the plaintiff, that Mrs. Squier, by thus suing the plaintiff upon the whole note, had abandoned the agreement to set off part of it against the 9*l.*, and consequently was liable in this action. The plaintiff, however, was nonsuited, with leave to move to set aside the nonsuit, and enter a verdict for the sum demanded.

Amos now moved accordingly, and contended that the defendant had clearly chosen to abandon the original agreement and return to the former situation with respect to the 9*l.*, since she had proceeded in the court of requests for the whole of her own claim on the note, and could not by law have enforced the demand in that court in any other manner; to which point he cited *Fountain v. Young*.^(a)

(a) 1 Taunt. 60. The Southwark Court of Requests act, on which that case turned, contained an exception of "any debt for any sum being the balance of an account on demand originally

*144] *Lord TENTERDEN, C. J. I think the nonsuit was right. The plaintiff has a demand on the defendant for goods sold, and is debtor to her in a larger amount. An agreement is made between them that the amount due to the plaintiff shall be taken in part payment of the sum which he owes. Is the subsequent conduct of the defendant inconsistent with this agreement? She sues in a court where only five pounds can be recovered. There would be due to her, not five pounds only, but the difference between that sum and the residue of twenty-one pounds, after deducting nine. Then, her suit leaving untouched the nine pounds, formerly set off, and the sum which she recovered and accepted in full, according to the provision of the local act, being less than was due to her at the time of instituting the suit, I think that she was still entitled to the benefit of the agreement, that justice was done by the nonsuit, and that it ought not to be disturbed.

PARKE, LITTLEDALE, and PATTESON, Js., concurred. Rule refused.

exceeding five pounds." The act referred to in the present case made the same exception; and it forbade splitting a demand to bring it within the jurisdiction in separate actions, but enabled the plaintiff to divide his claim and recover a portion (not exceeding 5*l.*) of the sum actually due, if he should be willing to accept the same in full of all demands in the cause.

*145] *The KING v. The Justices of SALOP. April 16.

Guardians and directors of the poor were incorporated by statute, and were thereby ordered to hold certain courts and meetings, at which any rate payer might object to their proceedings or accounts, and such objection should be taken into consideration; and if the matter could not at that time be settled to the satisfaction of the complaining party, it should be adjourned to the next court, to be there finally heard and determined.

A subsequent clause provided, that any person aggrieved by anything done in pursuance of the act, *and for which no particular method of relief was already appointed*, might appeal to the quarter sessions to be holden within four calendar months next after the cause of complaint should have arisen.

A rate payer appealed to the sessions against an order of the directors for the payment of sums due on annuities, and as interest on loans. The order had been made less than four months back, but the debts had not been incurred, nor the annuities granted within four months: Held, that the appellant was not confined to the remedy pointed out by the first-mentioned clause of the act, and that the cause of complaint had arisen within four months.

By statute 32 G. 3, c. 85, certain persons are incorporated under the name of the guardians of the poor of that part of the parish of Whitechurch which lies within the county of Salop, and twelve of them are to be directors of the poor. It is further enacted (sections 50, 51) that the directors shall enter the contracts and other proceedings, and the receipts, payments, debts, and credits, of the corporation of guardians in a book, which, on reasonable request and notice from any person paying rates, shall be produced for his inspection at any of the courts, assemblies, or meetings of the said corporation holden pursuant to the act; that such rate-payer may then and there "protest, and declare his objection to or observations upon" any of the charges, rates, matters, or proceedings contained in the book, and the same "shall then be heard and taken into consideration by such courts;" and if the matter of objection cannot then be settled to the satisfaction of the objecting party, it shall be adjourned to the next court or meeting of the corporation, *to be then finally heard and determined*. It is afterwards provided (sect. 56) that if any person shall think himself aggrieved by anything done in pursuance of the act, "*and for which no particular method of relief hath been already appointed*," such person may

*146] *appeal to the justices of the peace at any general quarter sessions to be holden for the county "*within four calendar months next after the cause of complaint shall have arisen*," and the determination of the sessions shall be final, binding, and conclusive to all intents and purposes.

At the general quarter sessions for Shropshire in October 1830, John Hol-

land, a rated inhabitant of the district mentioned in the act, appealed against certain orders which had been made for payment of money, and certain payments which had been made and allowed, within the preceding four months, by authority of the directors. The objection alleged was, that the orders, payments, and allowances were in respect of annuities which ought not to have been granted, and of interest on parish securities for debts which had been improperly contracted. The justices, after hearing counsel on each side, refused to go into the appeal, on the grounds, first, that the statute had provided a method of relief in this case, by application to the guardians and directors at one of their meetings; and, secondly, that the annuities had been granted, and the debts on which the interest was paid had been contracted, more than four months before the sessions. A rule was afterwards obtained, calling on the justices to show cause why a mandamus should not issue, commanding them to enter continuances and hear the appeal.

F. Pollock and *E. V. Williams* now showed cause. The sessions decided rightly. The appeal is only given where no other mode of relief has been provided by the act. For this grievance, if it be such, a remedy is provided by sect. 51, and it is expressly said there, that a matter adjourned to a second meeting of the *corporation pursuant to that clause, shall be then finally heard and determined. The cause of complaint did not arise within four [*147] months, for the true grievance was the original borrowing of the money, not the payment of each quarter's interest or annuity: otherwise a borrowing of money, even at the distance of twenty years back, might be called in question by any person coming into the parish and charged with rates, so long as interest continued to be paid for the loan. In *Short v. M'Carthy*, 3 B. & A. 626, which was an action of assumpsit against an attorney for neglecting to make proper inquiries at the Bank of England respecting certain stock, when he was employed by the plaintiff so to do; it was held, that the cause of action accrued at the time of the breach of duty, and not when the injury became known to the plaintiff. The same point was decided in *Brown v. Howard*, 2 B. & B. 73, where the defendant was employed to purchase an annuity for the plaintiff, and took a void security. So, in *Howell v. Young*, 5 B. & C. 259, which was a similar case, the Court held, that the misconduct, and not the consequential damage, was the substantial cause of action, and that the statute of limitations must take effect accordingly.

Campbell, and *Whately*, *contra*. The statute does not take away the appeal to the sessions in this case, but only gives the additional privilege of going before the court of guardians. The party is not obliged to do so. And the words, "to be then finally heard and determined," merely signify that the matter shall not be adjourned to another court. As to the limitation of time, a parishioner burdened by the payment of *annuities, or of interest on a loan, has a right at any time to ascertain whether such annuities were [*148] legal, or such loan valid. If the guardians kept a loan or grant of annuity private for four months, calling for no payment till that time had expired, could it be said that the rate-payer was excluded from his remedy? The cases cited do not apply; there the wrong was single, though it was committed at one time and the consequence felt at another. Here a substantive grievance arises to the rated parishioner from each of the periodical payments, by which he is burdened.

Lord TENTERDEN, C. J. I think the sessions ought to have heard the appeal. As to the first objection; the appeal to the sessions is given in cases for which no particular method of relief has been already appointed by the act. But the fifty-first section merely provides that a party having any objection to the proceedings of the guardians, may, at a court holden by them, protest and make his objection or observations, which shall be then heard and taken into consideration; and if such court cannot then finally settle and determine the matter to the satisfaction of the party making the objection, the same shall be adjourned over to the next court or meeting of the corporation, to be then finally heard and determined. But if they then persist in the proceeding objected to, it does not

appear to me that this clause can be looked upon as giving any method of relief against their order. With regard to the time of appealing; the matter objected to is the order for payment, and the payment, of interest and annuities. That seems to me the substratum of the complaint; not the borrowing money or granting annuities. An appeal therefore, *within four months of the order, *149] is in due time. What the sessions may decide on such an appeal is another question: we have only to determine whether or not they should have heard the appeal; and I think they should.

LITTLEDALE, J. I think the "cause of complaint" was the making the order, not the borrowing, or granting the annuities. Whatever the sessions might determine when they came to hear the appeal, I think they ought to have heard it.

PARKE, J. I am of opinion that the appeal was in time, and that it is immaterial when the annuities were granted or debt incurred. The grievance is, the being burdened in respect of the payments. If this were not so, a debt might be contracted privately by the directors, and if no interest were called for till the expiration of four months, the parishioners would have lost their right of appeal.

PATTESON, J., concurred.

Rule absolute.

*150] *The KING v. HORNER and ROUPELL, Esquires. April 16.

An order of justices for diverting a highway and stopping up a part of it, described the highway by termini, and by reference to a plan; the part to be stopped up was described as so many yards of the said highway, lying between certain letters on the plan, and coloured blue. Notice was published (pursuant to the statute 55 G. 3, c. 68), of the order having been made; but the notice had no plan annexed, and merely described the road by termini, and the part to be stopped up as so many yards of such road:

Held (LITTLEDALE, J., dubitante), that the order explained by a plan annexed, was good; but (per totam curiam), that the notice was insufficient.

CAMPBELL, in a former term, had obtained a rule (which was drawn up on reading certain affidavits, and a map and paper writings, thereto annexed), calling upon the justices of the county of Kent to show cause why a certiorari should not issue to remove into this Court an order of two justices for diverting a certain public highway, and for stopping part thereof, and also to remove an order of the justices at the quarter sessions for the said county for confirming and enrolling the said order, and all proceedings relating thereto.

The original order was made at a petty session, of which notice was given by the high constables pursuant to the statute 55 G. 3, c. 68, s. 2, and it was confirmed, and enrolled, together with a map thereto annexed, at the Maidstone quarter sessions, July 1830; notices of the making of such order having been first given, in the form hereafter mentioned. The order ran as follows:—

"Having upon view found that a certain part of a public highway within the said parish of Charlton, within the division, &c., in the county, &c., lying between the north-western corner of Woolwich Common and that portion of the turnpike road from Blackheath to Shooter's Hill which is near the seventh milestone, computed from London thereon, for the length of 1073 yards or thereabouts, and particularly described in the plan hereunto annexed, and coloured therein *151] partly blue and partly yellow, may be diverted and turned so as to *make the same nearer and more commodious to the public, and so as to render a certain part of the old highway of the length of 426 yards or thereabouts, and coloured blue upon the said plan, wholly useless and unnecessary, and having viewed a course proposed for the new highway in lieu thereof through the land and grounds of Sir Thomas Maryon Wilson, of, &c., Bart., of the length of 435 yards or thereabouts, and of the breadth of twenty-eight feet or thereabouts, being in the said parish of Charlton, within the division aforesaid, in the county, &c., and particularly described in the plan hereunto annexed, and therein coloured

red, and having received evidence of the consent of Sir T. M. W. to the said new highway being made through his lands hereinbefore described, by writing under his hand and seal; we do hereby order that the said highway be diverted and turned through the lands aforesaid in manner aforesaid."

Directions were then given to the surveyors for settling the compensation to be made, and taking the other steps required by the statute 13 G. 3, c. 78; and the order continued as follows:—"and we do further order, that when and as soon as the said new highway shall be properly made and fit for the reception of travellers, and completed and put in good condition and repair, and shall have been duly certified by us to be, such part of the said old highway *described in the said plan and coloured blue thereon and lying between the letters A. and B.* being of the length of 426 yards, and of the breadth of twenty-one feet upon a medium, *as appears by the said plan*, be stopped up, and the land and soil thereof sold," &c.

*Notices of the order were published pursuant to the statute 55 G. 3, c. 68, s. 2, being fixed up at the side of the highway to be diverted and stopped [*152 at the place from whence it was to be so diverted, and on the door of the parish church, and being also advertised in a county newspaper. They set out the order as above, but did not give any plan, and omitted those words in the order which refer to a plan. They stated, as usual, that the order would be lodged with the clerk of the peace, and would be confirmed and enrolled at the quarter sessions, unless, upon appeal, it should be otherwise determined. Messrs. Horner and Roupell, inhabitants of the parish, and aggrieved by the order, appealed against it at the sessions; but the order and proceedings were there confirmed, and filed with the clerk of the peace.

In moving for the certiorari several objections were taken to the order; and, among them, the two following:—That in the order of justices the termini of the portion of road to be stopped were not described in words, but were to be ascertained by reference to a plan; and that the notice of the order was equally uncertain in words, and made no reference to any plan. This latter objection applied also the notice of holding the petty session.

Gurney and *D. Pollock* now showed cause, and contended, as to these points, that there was no reason or authority for saying that an order might not be explained by reference to a plan annexed; and that the notice of the order, though it contained no such reference, was fixed up at the place itself from which the diversion *was to be made, and gave information of the place where the [*153 original order, with the plan, would be deposited after confirmation, and might be referred to, namely, the clerk of the peace's office.

Campbell and *Erle*, *contra*. The termini of the portion of road to be stopped should be sufficiently expressed in the order, without importing into it the plan and colours. The addition of these may not vitiate the order, but the requisite information should be given to the public in words. [Lord TENTERDEN, C. J. So much information as words are capable of conveying. PARKE, J. Is there any authority for saying that an order of this kind may not be explained by a map? It was so in *Rex v. Winter*, 8 B. & C. 785.] At all events, the notice of the order having been made, was insufficient, for that was not accompanied by any plan. The statute 55 G. 3, c. 68, was passed to the intent "that more public notice should be given of any order made or proceeding had" for diverting or stopping any highway; and the schedule, prescribing the form of notice where a road is to be diverted and stopped up, says, "here describe the road ordered to be turned, diverted, and stopped up;" and where the order is for stopping merely, "here describe the road ordered to be stopped up." In this case the road from which the diversion is to be made, is described in the notice, as "lying between the north-western corner of Woolwich Common, and that portion of the turnpike road from Blackheath to Shooter's Hill which is near the seventh milestone, computed from London thereon, for the length of 1073 yards or *thereabouts;" but then the notice as to the portion to be stopped, [*154 refers to it merely as "a certain part of the said old highway, being of

the length of 426 yards or thereabouts, and breadth of twenty-one feet," which will be rendered unnecessary by the diversion. It is true the public are informed that the order and plan will be deposited with the clerk of the peace, but they are not there at the time when the notice is given, and when the information is wanted.

LORD TENTERDEN, C. J. I have reluctantly come to the conclusion that these proceedings must be removed. I doubt if the notice of the intention to hold a special session was sufficient; but at all events the subsequent notice was not. It refers to no plan; it recites, in the words of the order, that a portion of the road there described may be diverted and turned so as to render a certain part of the old highway (426 yards in length) unnecessary, but does not show with any certainty what that part is; and it then sets out the order, that the road be so diverted and turned, and the 426 yards be stopped, without any further specification. I think such a notice is not sufficient.

LITLEDALE, J. I am of the same opinion, and for the same reason. If a part of the road is to be stopped, it must be described with the same precision as where the order is for stopping the whole. I have some doubt whether a plan can be annexed to an order of this kind, otherwise than as matter of surplusage.

PARKE, J. The notice prescribed by the statute ought clearly to be such *155] that the public may know what *portion of road is ordered to be stopped, without the necessity of going to the road itself, or to the clerk of the peace. This notice merely describes a road lying between two termini, and then states, as the purport of the order, that 426 yards of such road, not mentioning in what part, will become unnecessary and are to be stopped. The rule must therefore be absolute.

PATTON, J. I am of the same opinion, though I have formed it with reluctance, and was inclined to think otherwise till my attention was particularly called to the statute 55 G. 3, c. 68. The first schedule of that statute requires, where a road is to be stopped up, that the notice should describe, not the whole road by its termini, but the part which is to be stopped. This notice merely specifies a certain number of yards, without stating in what part of the road they lie. Rule absolute.

SPILLER and Another v. WESTLAKE. April 19.

It is no defence to an action by the payee against the maker of a promissory note, that the payee had agreed to convey an estate to the maker in consideration of a sum of money then paid or secured to be paid to the maker (being the sum mentioned in the note), and of a further sum to be paid at a future day, and that such an estate had never been conveyed.

THIS was an action brought by the plaintiffs, as payees, against the defendant as maker, of a promissory note for 200*l.*, bearing date the 5th of September, 1829, payable on the 2d of February, 1830. Plea, the general issue. At the trial before Taunton, J., at the last assizes for the county of Somerset, the plaintiff having proved the note, it was contended on the part of the defendant that there was no consideration for the note, inasmuch as the money for which it was *156] drawn was, by *agreement, to be paid in consideration of the plaintiffs executing a conveyance of a certain estate to the defendant, which they had not done. The agreement bore the same date with the note, and its terms, as to this matter, were to the following effect. The plaintiffs in consideration of 200*l.* to them then paid or secured to be paid by the defendant, and of the further sum of 1140*l.* to be paid to them by the defendant on the 2d of February then next, promised to surrender and convey to the defendant an estate in the agreement described, subject to two mortgages therein mentioned, in consideration whereof the defendant agreed to pay the plaintiffs on the making and passing of such surrender and conveyance the said sum of 1140*l.*, making, with

the sum of 200*l.* that day paid or secured to be paid as aforesaid, the full consideration-money agreed to be paid for the purchase of the estate. The note in question was given to secure the 200*l.* A dispute having arisen between the plaintiffs and the mortgagee as to the precise sum due to the latter, he refused, until that was settled, to convey the legal estate, and the plaintiffs were thereby prevented from assigning the legal estate to the defendant on the 2d of February (on which day the note was payable), and informed the defendant they could not do so. The learned Judge overruled the objection, but reserved liberty to the defendant to move to enter a nonsuit. A verdict having been found for the plaintiffs,

Merewether, Serjt, now moved as above, and contended that according to *Jones v. Barkley*, Dougl. 684, *Phillips v. Fielding*, 2 H. Bl. 123, and *Glazebrook v. Woodrow*, 8 T. R. 366, the *payment of the purchase-money and the execution and tender of the conveyance being concurrent acts, the [*157 vendor could not recover the purchase-money without having executed the conveyance, or offered to do so. The conveyance of the estate was the only consideration for the note; and that consideration having failed, the plaintiffs were not entitled to recover. If the plaintiffs had paid the 200*l.* as a deposit, they might now have recovered it back.

LORD TENTERDEN, C. J. Where, by one and the same instrument, a sum of money is agreed to be paid by one party, and a conveyance of an estate to be at the same time executed by the other, the payment of the money and the execution of the conveyance may very properly be considered concurrent acts, and in that case no action can be maintained by the vendor to recover the money until he executes or offers to execute a conveyance; but here the vendee by a distinct instrument agreed to pay part of the purchase-money on the 2d of February. I can see no reason why he should have executed a distinct instrument whereby he promised to pay a part of the purchase-money on a particular day, unless it was intended that he should pay the money on that day at all events. In the cases cited, the concurrent acts were stipulated for in the same instrument: (a) here the payment of the 200*l.* (which was part only of the purchase-money) was separately provided for.

LITLEDALE, J., concurred.

PARKE, J. I incline to think that the defence to this action would have been maintainable, if the circumstances *had been such that the defendant, [*158 having paid the 200*l.* as a deposit, would have been entitled to recover it back, but it is perfectly clear that he could not have been so entitled as long as the contract remained open. Now here the contract remained open at the time when the action was commenced, for the plaintiffs agreed only to convey the estate subject to the two mortgages. They were never bound to convey the legal estate to the defendant, but merely the equity of redemption; and that they never had refused to convey. There, can, therefore, be no rule.

TAUNTON, J., concurred.

Rule refused.

(a) See *Moggridge v. Jones*, 14 East, 486. 3 Campb. 38.

The KING v. The Lord Bishop of GLOUCESTER. April 19.

The registrars of a diocese were authorized by their patent of office (under the bishop's hand and seal) to appoint a deputy, to be "approved of and allowed by the bishop;" who, if he should not approve of and allow the deputy named and proposed to him, was empowered to nominate another, with a salary payable out of the profits of the registrarship. The registrars appointed a deputy, subject to the approbation and consent of the bishop, who, on being informed of it, answered that, "for good and sufficient reasons" he disapproved of the party nominated, but declined specifying his reasons. The Court refused a rule nisi for a mandamus to the bishop to admit the deputy.

THE Attorney-General moved for a rule to show cause why a mandamus

should not issue commanding the Bishop of Gloucester to admit Mr. Benjamin Bonnor to the office of deputy registrar of that diocese. The circumstances were as follows:—

The principal registrars, the Rev. Martin Benson and the Rev. R. F. Halifax, were appointed in 1784 by a patent under the hand and seal of the then bishop, granting to them jointly and separately the two offices of principal registrars, or *159] the registrarship, of the *diocese, to have, hold, and enjoy the same with the profits thereof, “and to exercise and execute the said offices by themselves, or by one of them, or by a sufficient deputy or deputies of them, or one of them, to be appointed by them and to be approved of and allowed by the bishop;” and providing that “in case the said principals should not either of them by themselves execute the office, and the bishop should not approve of and allow the deputy by them or one of them named and proposed unto him, it should then be lawful for the bishop for the time being to nominate and authorize a sufficient deputy to exercise the said offices, and to him to allot the sum of 80*l.* a year clear of all deductions arising out of the profits of the said offices, or any sum not exceeding that, as he should judge meet.” The offices were granted to the two registrars for their natural lives, and that of the longest liver, in as ample manner (except what in the patent was excepted) as any of their predecessors, some of whom were named, had held the same. The patent was ratified by the Dean and Chapter.

The affidavits stated, that in the oldest patent in the registry, dated 1713, the clause requiring the bishop’s approbation, and authorizing him in the case above mentioned to appoint the deputy, did not occur, and that it was first introduced in a patent of 1736.

In November, 1830, Mr. Gardner, the then deputy registrar, after an investigation of some charges against him, resigned his office, and the registrars, by an instrument under their hands and seals, nominated, authorized, and deputed, subject to the approbation and consent of the Bishop, Benjamin Bonnor, Gentleman, *160] for them and in their place, names, and stead, to *do all things belonging to the office of principal registrar, and to receive all dues for their use; promising to make him the usual allowances, and to ratify his lawful acts in the premises. It did not appear that any other form or mode of appointment was customary, or that anything further was necessary, except the approbation of the bishop, and an authority from the Archbishop of Canterbury or the Master of the Faculties in London, to act as a notary public.

Mr. Gardner resigned, and Mr. Bonnor consented to become deputy, on the 19th of November. On that day the registrars informed the bishop by letter of the vacancy in the office, and that Mr. Bonnor had been nominated to it, subject to his approbation; and they requested to know his sentiments upon the subject. The appointment, in form as above mentioned, was made out on the 23d, no answer having at that time been received. On the 23d, the bishop wrote from London acknowledging the letter of the 19th (which absence from town prevented his answering before), and requesting to see the registrars’ patent. This was sent, and at the same time a letter from the registrars informing the bishop of the appointment made on the 23d. On receiving these communications (November 25) the bishop immediately returned for answer:—“I lose no time in acquainting you that for good and sufficient reasons I decidedly disapprove of Mr. Benjamin Bonnor holding the situation of deputy registrar of my diocese.” And, in reply to a second letter from Mr. Halifax on the subject of the appointment, he wrote, “As you tell me that the appointment of a deputy registrar is a point at issue between us, it will be right to avoid making any further mention *161] of it at *present, except to say, that I by no means impeach your motives and those of your colleague in your proceedings, or in your choice of Mr. Bonnor, and I trust you will give me credit for being actuated only by feelings of duty in giving my negation to that appointment.” Mr. Halifax wrote two other letters, in the last of which (December 7th) he gave some account of the changes which led to Mr. Gardner’s resignation. The bishop, in reply, expressed

his surprise that such a statement should be made to him for the first time after the investigation was closed and the office vacated, and he declined then entering into any examination of that case. He added, "I cannot see the use or the propriety of our reverting to the subject of Mr. Bonnor. Had you waited even for a single day after I had seen a copy of the patent, I might perhaps have been able to satisfy you and Mr. Benson upon the grounds of my opinion relative to your nomination. As things now stand, you must perceive that you and your colleague have no right to call upon me to state my reasons for the exercise of my discretion. I have not made the least charge, reflection, or insinuation against the character of any person, and, consequently, I have nothing to explain." The registrars afterwards made a formal request to the bishop, that he would approve the nomination or assign reasons for refusing. He declined to do either, but offered, if the appointment made without his consent were withdrawn, legal proceedings abandoned, and an explicit admission given of his right of approving or rejecting, to take the subject into further consideration on a new appointment of Mr. Bonnor, and to state such objections as he might then still retain. This, however, was not agreed to. Mr. Bonnor himself *addressed two letters [*162 to the bishop, who returned answers to a similar effect with those given to the registrars; observing in one of them, that he might have expressed himself more fully on the subject if he had not heard that legal proceedings were contemplated, which rendered any further discussion improper. There were numerous affidavits of Mr. Bonnor's good character and fitness for the office.

The *Attorney-General* referred to the several passages of the correspondence above stated, and contended that the bishop, though authorized to inquire into the fitness of the party nominated to be deputy registrar, and to decide upon the result of such inquiry, was not empowered to give an absolute negative to the appointment without adducing any reason, as he had claimed to do here. [Lord TENTERDEN, C. J. Is there any authority for saying, that in such a case as this we can call upon the Bishop to allege his reasons?] In *Rex v. The Bishop of London*, 18 East, 419, where the bishop had stated, as his ground for refusing to license a lecturer, that he did not approve of the gentleman appointed as a fit person, the Court granted a rule nisi for a mandamus. [Lord TENTERDEN, C. J. But it was ultimately discharged.] The Court, at least, thought the question a fit one for some inquiry. This is an office in which the administration of justice is concerned. The registrars are answerable for their deputy; the appointment, therefore, ought not to be placed absolutely in the hands of the bishop, as it would be if he could exercise the power now claimed. [Lord TENTERDEN, C. J. He has made no appointment. *The registrars may [*163 still nominate another deputy. PARKE, J. There is no mode of forcing a person who has a discretionary power, to exercise his discretion in a particular manner.] It is a question whether he has that power. The clause requiring the bishop's approbation does not appear in patents earlier than 1736.

Lord TENTERDEN, C. J. The authority given to the registrars by this patent, is, to exercise the office by themselves or one of them, or by a sufficient deputy or deputies "to be appointed by them, and to be approved of and allowed by the bishop." In this case he disapproves of the appointment, and he distinctly states that he has good and sufficient reasons for so doing. It is true, he says he has made no charge, reflection, or insinuation against any person's character: but he may have reasons sufficient to determine his judgment, without feeling called upon to throw out imputations. He has, by law, the power of approving or disapproving, and we cannot call upon him to exercise it in one particular way or another.

LITLEDALE, J. I think the rule ought not to be granted. Suppose a mandamus went, and the bishop made a return assigning reasons which he in his discretion thought sufficient, but which we thought otherwise; what course could we take?

PARKE, J., and TAUNTON, J., concurred.

Rule refused.

*164]

*HARRIS *v.* DREWE. *April 19.*

The right to sit in a pew may be apportioned; and, therefore, where by a faculty, reciting, "that A. had applied to have a pew appropriated to him in the parish church in respect of his dwelling-house;" a pew was granted to him and his family for ever, and the owners and occupiers of the said dwelling-house; and the dwelling-house was afterwards divided into two: Held, that the occupier of one of the two (constituting a very small part of the original messuage), had some right to the pew; and in virtue thereof might maintain an action against a wrong-doer.

DECLARATION stated, that the plaintiff was possessed of a messuage with the appurtenances, situate in the parish of Keynsham in the county of Somerset, and therein inhabited and dwelt with his family, and by reason thereof had, and still of right ought to have, for himself and family inhabiting the said messuage, &c., the use and benefit of a certain pew in the parish church of Keynsham aforesaid, to sit, stand, or kneel in, to hear and perform divine service; yet the defendant, well knowing the premises, &c., without the leave and license of the plaintiff, pulled down and prostrated a part of the pew, and enclosed and separated a part from the residue thereof, and kept and continued the same so enclosed, &c. Plea, not guilty. At the trial before Taunton, J., at the last assizes for the county of Somerset, the following appeared to be the facts of the case:—By a faculty from the Bishop of Bath and Wells dated 1765, reciting "that John Emery was possessed of a messuage or dwelling-house in Keynsham, formerly called The Old Lamb and Lark public-house, and that he had no seat to which he had a legal title, and had applied to have a pew in the church appropriated to him in respect of such messuage or dwelling-house, to be used by him and his family for ever, and the successive owners and occupiers of the same," the pew was granted to John Emery and his family for ever, and the owners and occupiers of the said messuage, exclusive of all other persons. Emery, and several persons who had

*165] occupied the *dwelling-house under him, had from time to time used the pew, which was one capable of holding thirty persons. The plaintiff Harris having purchased the premises of Emery's daughter, had let the old dwelling-house to one Taylor, who occupied it at the time when the defendants, who were churchwardens, committed the act complained of in the declaration, by dividing the pew into two. The plaintiff himself lived in a house adjoining that formerly occupied by Emery. It had at one time been a summer-house and afterwards a stable attached to the old house, but was converted by Mrs. Emery, after the death of her husband, into a shop, in which she carried on business. Just before the plaintiff came to live there, a room over the kitchen, and which was part of the old dwelling-house was laid into this building; and in the new dwelling-house, thus composed, the plaintiff lived at the time when the act complained of was done by the defendant. It was objected on the part of the defendant, that as the plaintiff did not inhabit and dwell with his family in the ancient messuage in respect of which the pew was granted, he was not entitled to recover: but the learned Judge thought, that as the plaintiff occupied part of the old house, which had been laid into the new one, the right of the pew, like a right of common of pasture,^(a) might be apportioned, and that the plaintiff, having some right which had been invaded by the defendants, was entitled to recover; and he directed the jury to find a verdict for the plaintiff, but reserved liberty to the defendant to move to enter a nonsuit.

*166] **Merewether*, Serjt., now moved accordingly. The messuage in respect of which the pew was granted was not inhabited by the plaintiff, but by Taylor, who was entitled to the pew, if any body could claim the exclusive possession of it against the churchwardens. There is no instance where a person has been held entitled to enjoy a pew annexed to a messuage, by reason of his occupation of only a small part of that messuage; it would be most unreasonable that a party, by holding only a single room, should be entitled to the enjoyment of a pew capable of containing a large number of persons. The pew was

(a) *Wild's Case*, 8 Rep. 156. *Tyringham Case*, 4 Rep. 36.

annexed to the dwelling-house, to which the summer-house was only an out-house or appurtenance; and the occupation of the room over the kitchen could make no material alteration in the case. Many doubts and disputes would be the consequence of making such nice distinctions; for the house might be divided among numerous occupiers. The real question was, who was the substantial occupier of the house, and as such entitled to the pew?

LORD TENTERDEN, C. J. I am of opinion the verdict was right. It appears that in 1765 a faculty was granted by the Bishop of Bath and Wells to John Emery, and the owners and occupiers of a messuage or dwelling-house of which the summer-house in question was part. The plaintiff was the owner of the whole messuage, and the occupier of the summer-house, and of one room which was part of the old dwelling-house. The faculty gave a right to the several persons who should be occupiers of the messuage to use the pew. If those persons should become too numerous to use the pew *conveniently, and should disagree, they must settle their differences among themselves. The church- [*167 wardens, who derived their authority from the ordinary, were mere wrongdoers.

LITTLEDALE, J. I am of the same opinion. The plaintiff having a right by the faculty to use the pew, the churchwardens had no right to interfere as they did, and were wrongdoers. It may certainly happen, in consequence of a house being subdivided, that three or four families may become entitled to use a pew belonging to the original messuage, and they may require more accommodation; and a question may arise how many persons are entitled to use the pew in respect of each of the subdivisions. That is, however, a matter to be settled among the respective owners. The right to enjoy the pew was annexed to the old dwelling-house altogether. The plaintiff lives in a part of that house; he, therefore, has some right to enjoy the pew, and may maintain an action in respect of it.

PARKE, J. The verdict was right. The churchwardens had no right to interfere with persons deriving title through a faculty granted by the bishop. The whole of the premises belonged to the plaintiff, and part of the ancient dwelling-house was occupied by him. The right to sit in the pew belonged to those who occupied the ancient dwelling-house, which has since been converted into two. The case must be considered in the same light as if the ancient house was occupied by two families. In that case all the members of the two families would have a right to use the pew; and if they became too numerous to use it *conveniently, they must, by some agreement among themselves, settle the mode of enjoying it. A wrongdoer has no right to interfere. Here [*168 the defendants were wrongdoers.

TAUNTON, J. The right of sitting in an allotted space of the church may be compared to a right of common of pasture, which may be apportioned. If a person seised of a messuage and forty acres of land, having a prescriptive right of common on a waste for all commonable cattle levant and couchant upon the messuage and forty acres, as to the said messuage and forty acres appertaining, make a feoffment to another of five acres of that land, the common is severable, because the prescription to have common on the land in which, &c., for the cattle levant and couchant on the land to which, &c., extends to the whole and every parcel. So, in this case, by the faculty, the pew was granted to John Emery and his family for ever, *and the occupiers of the messuage* called The Lamb and Lark. The right, therefore, to use the pew attached to the occupier of every part and parcel of that messuage. Here, it having been proved that the plaintiff had taken a part of the ancient dwelling-house into the new one, some part of the right which appertained to the ancient dwelling-house also attached to the new one. The churchwardens were clearly wrongdoers. They were only the officers of the ordinary; and here the ordinary is precluded by the act of his predecessor.
Rule refused.

*169] *CURTIS and SARAH his Wife v. DRINKWATER. April 19.

In an action against a coach proprietor for negligence, it appeared that the coach travelled from the county of O. to the county of W.; that the plaintiff became an outside passenger for hire; that there was luggage on the roof of the coach, and no iron railing between the luggage and the passengers; and that the plaintiff, being seated with her back to the luggage, was by a sudden jolt, thrown from the coach, and her leg was thereby broken in the county of O., where she remained some time to be cured; but before she was fully recovered she removed to the county of W., where further medical attendance became necessary, and expense was consequently incurred. The learned Judge directed the jury to find for the plaintiffs, if they were of opinion that the injury sustained was occasioned by the negligence of the defendant: The jury found for the plaintiff; and stated that they so found on account of the improper construction of the coach, and of the luggage being on the seat: Held, that the case was properly submitted to the jury, and that the facts found specially by them amounted to negligence in the defendant:

Held also, that the inconvenience suffered, and expense incurred, by the plaintiff in the county of W., was *material evidence of a matter in issue* arising there, within the meaning of the undertaking given by the plaintiff, in answer to a motion to change the venue.

THIS was an action against the proprietor of a stage-coach employed in carrying passengers from Oxford to Leamington in the county of Warwick. The declaration stated, that the defendant received the plaintiff Sarah upon his coach as a passenger from Oxford to Leamington for a certain reward, and by reason thereof ought carefully to have conveyed her; but that he, not regarding his duty, conducted himself so negligently and unskilfully in that behalf, that, by the negligence, unskilfulness, and default of one Hemings, his servant, the plaintiff Sarah was thrown off the coach, and greatly bruised, &c., and became sick, and remained so from thence hitherto, during all which time she suffered great pain and anguish. The second count stated the injury to have arisen from the negligence of the defendant. Plea, not guilty. At the trial before Lord Lyndhurst, C. B., at the last assizes for the county of Warwick, it appeared that the plaintiff Sarah Curtis took her seat, as an outside passenger, on the back part of the coach, having both her hands occupied so as to prevent her holding *170] by the iron railing on the roof. It appeared *further, that there was a considerable quantity of luggage upon the roof of the coach; that there was no iron railing between the luggage and passengers: and that the plaintiff, Sarah Curtis, being so seated on the back of the coach, with her back to the luggage, was by a sudden jerk thrown from the coach in a street in Oxford, and had her leg broken. Several witnesses proved that the plaintiff had repeatedly said the accident was not owing to any fault of the coachman, but to the fact of her having both her hands full, so as to prevent her holding by the iron when the jolt took place. The plaintiff remained at Oxford a considerable time; but before she fully recovered she removed to Leamington. When she arrived there, there was considerable inflammation in her leg, which was attributed to the journey; and she was attended there by a medical man. The venue having been originally laid in the county of Warwick, the defendant obtained a rule to change it to Oxfordshire; which rule was discharged upon the plaintiffs undertaking to give material evidence of some matter in issue arising in the county of Warwick. It was contended on the part of the defendant, that the plaintiffs had not satisfied this undertaking, inasmuch as the pain suffered by the plaintiff Sarah in Warwickshire, and the consequent expense there incurred, were referable to the journey, which she undertook too soon, and not to the wrongful act of the defendant. The learned Judge was of opinion, that the proof of inconvenience suffered, and expense incurred at Leamington, was evidence sufficient to satisfy the undertaking; but he reserved liberty to the defendant to move to enter a nonsuit, if the jury should find for the plaintiff; and he directed them *171] so to find, *if they were of opinion that the injury sustained was occasioned by the negligence of the defendant or his servant. The jury found for the plaintiff; and stated that they so found, on account of the improper construction of the coach, and of the luggage being on the seat.

Goulburn, Serjt., now moved for a nonsuit or a new trial, and he contended that

there was no material evidence of any matter in issue arising in the county of Warwick. The matter in issue was, whether the plaintiffs had sustained any damage, the consequence of a wrongful act of the defendant. The plaintiffs, therefore, proved the whole issue by showing a wrongful act of the defendant, and a consequent inconvenience and expense sustained by the plaintiff in Oxfordshire. The inconvenience suffered and expense incurred in Warwickshire, were attributable, not to the wrongful act of the defendant, but to the imprudent conduct of Sarah Curtis, the plaintiff, in having moved too soon. Secondly, he submitted that the verdict was not founded upon the negligence of the defendant, but upon the improper construction of the coach, whereas the declaration only charged the defendant with negligence. And he also contended, that the learned Judge ought to have left it to the jury to say, whether the plaintiff had not brought the accident upon herself by her own negligence and want of caution; and that if so, the defendant was not liable.

Lord TENTERDEN, C. J. I am of opinion there should be no rule. The accident occurred in Oxfordshire. The person who sustained the injury, after having remained there some time, goes to her own home in Warwickshire, *and there requires medical attendance, which she would not have re- [*172 quired if she had not been thrown from the defendant's coach by the negligence or unskilfulness of the defendant or his servant. The inconvenience suffered and expense incurred in Warwickshire were a damage to the plaintiff, the consequence of a wrongful act of the defendant; and there was, therefore, a matter in issue arising in the county of Warwick within the meaning of the undertaking. As to the other ground, I think the direction of the learned Judge was perfectly right; for the malconstruction of the coach, or improper position of the luggage, would be negligence in the defendant or his servants.

The rest of the Court concurred.

Rule refused.

T. WORTH and W. SWANNELL v. F. J. BUDD, J. PAINE, and
J. ODELL. *April 20.*

A farmer and grazier had frequently, before September 1825, when the new bankrupt act, 6 G. 4, c. 16, came into operation, and in some few instances after, purchased cattle with a view to resale, and not for the purposes of his farm. A commission of bankrupt having issued against him after September 1825, it was held, in an action brought to try the validity of the commission, that the acts of buying before that period were evidence to explain the quality of the subsequent acts.

The forty-fourth section of the 6 G. 4, c. 16, does not entitle assignees of a bankrupt, and persons acting in their aid, to double costs on a verdict found for them in an action for things done in pursuance of the statute.

TRESPASS for breaking and entering a messuage of the plaintiffs, taking their goods, &c. Plea, not guilty. At the trial before Gaselee, J., at the last assizes for the county of Bedford, the following appeared to be the facts of the case:—The plaintiffs claimed under an assignment bearing date the 7th of January, 1830, made *by Joseph Swannell, a bankrupt, to them, of his farming stock, [*173 crops, and utensils, household and other furniture, and all other his personal estate and effects, &c. The plaintiffs took possession on the 13th of January of the bankrupt's house (which was leasehold for years), and of the other property. On the 23d of January, 1830, a commission of bankrupt issued against Swannell, and a provisional assignment was executed to the defendant Odell, who entered: but that commission was superseded; and on the 29th of January a new commission issued, founded on an act of bankruptcy committed before January 1830, and under that Budd and Paine were appointed assignees, and Odell acted as the messenger. On the 27th of March the bankrupt's goods were sold under the authority of the first two defendants acting under that commission. The evidence as to the trading was, that Swannell, the bankrupt, had for many years

been a farmer and grazier, and that in numerous instances before September 1825, when the statute 6 G. 4, c. 16, took effect, he had bought cattle, not for the mere purpose of feeding them on his farm, but for sale; and that he had immediately sold them at a profit. This evidence was objected to, on the ground that acts of trading before the statute were not admissible. It was proved further, that the bankrupt, in three or four instances after the passing of the statute, had purchased cattle, not for the purposes of his farm, but for sale, and which he had sold again in Smithfield market. It was contended, that the plaintiffs were at all events entitled to nominal damages for the trespass committed by the defendants in entering the house before the second commission issued. Upon this point the learned Judge reserved liberty to the defendants *174] to move to enter a *nonsuit. As to the other point, he told the jury that the trading by the bankrupt before the 6 G. 4, c. 16, took effect, was not of itself sufficient to support the commission, but that he thought it was evidence for them to consider, in explanation of the acts of trading subsequent to the statute; the question for their consideration being, whether the purchases of cattle after the statute were made in order to carry on the farming business, or for a purpose wholly unconnected with the farm, viz. that of selling again with a view to profit. If they thought the purchases were made with the latter object, then there was a sufficient trading to support the commission, and they ought to find for the defendants. The jury having found for the defendants,

Storks, Serjt., now moved to enter a verdict for the plaintiffs for nominal damages, on the ground that the plaintiffs were at all events entitled to recover something; because the first trespass committed by the defendants was before the issuing of the second commission, and the first commission having been superseded, was null and void. And for a new trial, on the ground, first, that evidence of the acts of buying and selling before the passing of the last bankrupt act, 6 G. 4, c. 16, ought not to have been received, because a trading before that statute would not support a commission sued out afterwards, *Surtees v. Ellison*, 7 B. & C. 750; and, secondly, that assuming such evidence to have been admissible, it ought to have stated in distinct terms to the jury that their verdict was not to be founded solely on the trading before September, 1825.

*175] *Lord TENTERDEN, C. J. I am of opinion that the acts of trading before the statute 6 G. 4, c. 16, came into operation were properly received in evidence; not because they were proof of a trading before the statute which could support the commission issued afterwards, but because they were proof of a trading after the statute. The acts of trading before the statute were undoubtedly evidence to the extent of showing that he had begun to trade before the statute; and then the acts proved after the statute show that the trading, which had begun before, continued subsequently. I think it was not necessary for the Judge, in his direction to the jury, to distinguish more precisely than he did between the first and the latter acts of trading, and that his doing so would only have had the effect of confusing the jury. As to the other point, the plaintiffs are not entitled to recover nominal damages. The proof of a valid commission founded on an act of bankruptcy prior to the first entry of the defendants, shows, not that the assignees were justified under the first commission in what they did, but that the plaintiffs are not in a condition to say, that at the time when the alleged trespass was committed, they had any cause of complaint.

LITLEDALE, J. I am of the same opinion on both points. The acts of trading prior to the statute were evidence to show *quo animo* the other acts were done. I rather doubted whether the Judge ought not to have told the jury, in express terms, that the acts of trading before the statute ought not to have been made the foundation of their verdict; but, on the whole, I think the distinction was sufficiently pointed out.

*176] *PARKE, J. I am of the same opinion. The plaintiffs were not entitled to nominal damages on the ground that the defendants first entered by virtue of the superseded commission, because, though that commission was of no effect, and therefore no justification to those who entered under it, the

plaintiffs' right of action fails ; for the house, being leasehold, vested in the assignees under the valid commission, by relation, from the time of the act of bankruptcy, and the plaintiffs cannot sue those assignees, and the persons claiming under them for trespasses subsequent to that act. The other question is, whether the acts of trading, prior to the passing of the statute 6 G. 4, c. 16, were admissible in evidence ; and if they were, whether the Judge, in his address to the jury, ought to have distinguished between those which were prior, and those which were subsequent, to the statute. Now, the acts of trading before the statute were admissible to prove that there was a trading at that time by the bankrupt, and so to explain the acts subsequent to the statute, and to show that they were a part of one continued trading : and if the bankrupt continued to trade after the new act of parliament, he would be a trader within its meaning. The evidence being admissible, I think that no objection can be taken to the manner in which it appears that the learned Judge left the case to the jury.

PATTESON, J. It is admitted that there was some evidence of trading subsequent to the statute. The prior acts of trading were evidence to show the quality of the subsequent ones. As to the other point, this was a leasehold estate, and the assignment relates to the prior act of bankruptcy. Rule refused.

*A rule nisi was afterwards obtained for entering a suggestion on the roll, to entitle the defendants to double costs pursuant to 6 G. 4, c. 16, [*177 s. 44.

Biggs Andrews now showed cause. *Carruthers v. Payne*, 5 Bingh. 270, and *Edge v. Parker*, 8 B. & C. 697, shows that the first part of the forty-fourth section, as to the limitation of actions, applies only to actions brought against commissioners or other officers discharging a public duty, and not against assignees or others for the purpose of trying a disputed private claim. The latter part of the clause is evidently confined to those cases which are contemplated in the first. The assignees, then, here, are not entitled to double costs. And as to Odell, he cannot claim double costs under the statute, since he was acting generally under the authority of the assignees, and not upon any warrant to him as messenger ; for no evidence of such warrant was given at the trial. If the assignees, therefore, are not within the section, the other defendant is in the same situation. He could not have been acting as messenger before the valid commission issued, and, as to that part of the transaction, he could only justify under the assignees.

Campbell and Dodd, contra. *Edge v. Parker* and *Carruthers v. Payne* were decided on the first part of the section limiting actions to three calendar months after the act done, whereas this case depends on the latter part of the clause, on which no decision has been pronounced. As to the defendant Odell, there was evidence given at the trial that he was acting in his *capacity of messenger under a warrant, and not merely under the general authority of the assignees. If it was not fully proved, it was because the fact was admitted. He, therefore, at all events, is entitled to double costs. [*178

Lord TENTERDEN, C. J. It has been held, in the cases cited, that the first part of the forty-fourth section does not apply to actions against assignees ; and if those decisions be correct, there is no ground for saying that the latter part of the section applies to such actions. The assignees, therefore, are clearly not entitled to double costs. Nor will Odell be so entitled, if he acted merely in aid of the assignees without a warrant from the commissioners. We will, before we pronounce our judgment, inquire of the learned Judge who tried the case whether the fact that Odell acted under a warrant from the commissioners was either proved or admitted.

On a subsequent day Lord TENTERDEN said that the learned Judge had informed the Court that no evidence had been given to show that Odell had acted under a warrant from the commissioners ; nor had that fact been admitted. That being so, he must be considered as having acted in aid of the assignees ; and must stand in the same situation with them as to costs.

Rule discharged.

*179] ***JOHN BLACHFORD, Gent., one, &c., v. HENRY DOD
and CHARLES DOD. April 20.**

In an action by an attorney for maliciously, and without probable cause, indicting him for sending a threatening letter, it appeared, that his clients having inquired of the defendants as to the truth of a representation made by a person who had offered to buy goods of them, the defendants replied, that they would not be responsible for the price of the goods, but believed the person had the employment he represented. The goods were then supplied to him. His representation turned out to be false, and the plaintiff, by direction of his clients, wrote a letter to defendants, demanding payment of them of the price of the goods obtained from his clients through the defendants' representation, and stating that the circumstances made it incumbent on his clients to bring the matter under the notice of the public, if the defendants did not immediately discharge the amount, and that he had instructions to adopt proceedings if the matter were not arranged in the course of the morrow; and that as those measures would be of serious consequence to the defendants, he hoped they would prevent them by attention to his letter. The defendants were then summoned before a magistrate, to answer a charge of obtaining goods under false pretences. The plaintiff served the summons and attended with his clients, and the complaint was dismissed. The defendants afterwards indicted the plaintiff for sending a threatening letter contrary to the 7 & 8 G. 4, c. 29, s. 8, and he was acquitted. On the trial in this action, the Judge, without leaving any question to the jury, decided that there was reasonable and probable cause for preferring the indictment:

Held, that that decision was correct, and that the evidence did not raise a question of fact for the jury, whether the defendants bona fide believed that they had a reasonable cause for indicting, but a pure question of law for the Judge, whether the defendants had such reasonable cause.

THIS was an action against the defendants for maliciously and without any reasonable or probable cause, indicting the plaintiff for knowingly and feloniously sending the defendants a threatening letter (which was particularly set out in the indictment, and in the declaration), with intent to extort money. Plea, not guilty. At the trial before Lord Tenterden, C. J., at the London sittings after last term, the following appeared to be the facts of the case:—On the 5th of February, 1830, a man dressed in seaman's apparel came to the warehouse of Messrs. Blachford, who sold charts, sextants, quadrants, &c., and stated his name to be Forbes; that he was mate of a vessel called the *Malvina*, of which Messrs. Graham and Sons were owners; and that being about to sail for Malaga, he wanted a quadrant and some charts. The price was 3*l.* 13*s.*, and not having ready money to pay for them, *he offered a note which purported to be *180] drawn by the captain of the *Malvina* on Graham and Sons for a month's wages. Mr. William Blachford, the partner then in the warehouse, proposed to inquire of Graham and Sons whether Forbes was the person whom he represented himself to be; upon which the latter observed that the owners did not like to be troubled, and requested that Mr. Blachford would apply to the defendants, who were ship brokers. Mr. Blachford sent to the defendants to make the inquiry, and one of the defendants said, that he would not be answerable for payment of the note, but that he believed Forbes was mate of the *Malvina*. Messrs. Blachford then furnished Forbes with the quadrant and charts, and took from him the note on the owners for 3*l.* 13*s.* On Monday the 8th of February, Messrs. Blachford were informed by Forbes that the representation made by him was false, and instructed the plaintiff, as their attorney, to write a letter to the defendants on the subject. He accordingly wrote the letter set out in the indictment. The contents were seen and approved of by Mr. W. Blachford before it was sent. It was in the following terms:—"11th February, 1830. I am directed by Messrs. R. and W. Blachford of the Minories, to apply to you for the purpose of demanding a payment of 3*l.* 13*s.* for goods obtained from them through a reference from your firm, under circumstances which make it incumbent on them to bring the matter under the notice of the public, if you do not immediately discharge the amount. I have my clients' instructions to adopt proceedings if the matter be not arranged in the course of to-morrow; and as the nature of those measures will be of serious consequence to you, I hope you *181] will see the propriety of *preventing them by your attention hereto." On the 15th of February, the plaintiff, by direction of his clients, applied to the lord mayor for a warrant against the defendants for aiding Forbes in ob-

taining goods from Messrs. Blachford under false pretences. The officer of the lord mayor made out a summons, which was afterwards served by the plaintiff on the defendants, calling on them to appear before the lord mayor on the 18th of February, to answer a charge of obtaining goods under false pretences, with intent to defraud Messrs. Blachford thereof. On that day the plaintiff, accompanying his client, appeared before the lord mayor, who thought the charge was not made out, and dismissed the complaint. On the 26th of February, the defendants gave the plaintiff notice that they intended to prefer a bill against him at the next Old Bailey sessions, for sending a threatening letter, contrary to the statute 7 & 8 G. 4, c. 29, s. 8, and at the May sessions they preferred an indictment against the plaintiff (which was that set forth in the declaration) for feloniously sending the defendants a letter, threatening to accuse them of having obtained goods under false pretences from R. and W. Blachford, with intent, by such letter, to extort money from the defendants; and also for feloniously sending the defendants another letter, demanding money from them with menaces, &c. Upon that indictment the plaintiff was tried and acquitted. It was contended on the part of the defendants, that the letter written by the plaintiff showed reasonable cause for instituting the prosecution; the writer's object being manifestly to threaten the defendants with public exposure by a criminal proceeding; and the letter, in its terms, importing a demand of money with menace, within the meaning of 7 & 8 G. 4, c. 29, s. 8. But assuming that to be [*182] *doubtful on the face of the letter, still it was said that the purpose to obtain payment of the £l. 13s. by accusing the defendants of having by false pretences induced Blachfords to part with their goods, appeared clearly from the language of the summons obtained from the lord mayor, and served upon the defendants. The plaintiff's counsel insisted that it was a question of fact to be submitted to the jury, whether the defendants believed that they had good ground for preferring the indictment; but Lord Tenterden was of opinion that, there being no fact in dispute, probable cause, or the want of it, was wholly a question of law; and that as there was no plausible pretext for demanding the money from the defendants, the latter had reasonable and probable cause for indicting: he therefore nonsuited the plaintiff.

Campbell now moved for a new trial. First, the question was, whether the defendants believed they had probable cause for indicting the plaintiffs for sending the letter, and this, as a question of fact, ought to have been left to the jury. Secondly, assuming that it was a pure question of law, the facts proved showed that they had no reasonable or probable cause for preferring the indictment. As to the first point, in *Ravenga v. M'Intosh*, 2 B. & C. 693, which was an action for a malicious arrest, it was left to the jury to say whether the defendant, when he made the arrest, acted *bonâ fide* upon the opinion of his legal adviser, believing that he had a good cause of action; and this Court held the direction right. The defendant's motive and state of mind were the material question, and that the jury were to determine. In *Nicholson v. Coghill*, 4 B. & C. 21, where the defendant had been the actor *in putting an end to the former proceed- [*183] ings, viz. by voluntarily discontinuing them, and there had been a very short interval between the arrest and the abandonment of the action, the absence of probable cause, and malice on the part of the defendant, were held to be matter for the consideration of the jury. So in this case, it ought to have been left to the jury to say whether the defendants believed, at the time when they preferred the indictment, that the plaintiff was guilty of the offence for which they caused him to be indicted. The letter itself, the summons, and the notice, were evidence to go to the jury, that the defendants did not believe the charge, and that they acted from a corrupt motive. If probable cause be a pure question of law, it must admit of being propounded so as to be applicable to all cases. But, assuming it to be a mere inference of law resulting from the facts proved, the fair conclusion here is, that the defendants had no probable cause for preferring the indictment. The letter could not constitute an offence within the statute 7 & 8 G. 4, c. 29, s. 8, which enacts, that if any person shall knowingly send or

deliver any letter demanding of any other with menaces, and without any reasonable or probable cause, any money, &c., or accusing or threatening to accuse any person of a transportable offence with intent to extort money, every such person shall be guilty of felony. Surely the plaintiff's clients had reasonable ground for demanding the money from the defendants. The plaintiff himself wrote the letter as attorney, and he did so, not for the purpose of extorting money for his own benefit, but of compelling payment to his clients of a sum which they had ground for believing the defendants ought to pay. The letter
 *184] itself does not import a threat *to indict the defendants for obtaining goods by a false pretence.

LORD TENTERDEN, C. J. I think there ought not to be any rule. The first question is, Whether I ought, under the circumstances of this case, to have decided that the defendants had or had not reasonable or probable cause for preferring the indictment against the plaintiff, or to have left that wholly or in part to the jury. Then, supposing I was at liberty to decide that point, the next question is, whether my decision was right. As to the first point, it is difficult to lay down any general rule as to the cases where the opinion of a jury should or should not be taken. I have considered the correct rule to be this: if there be any fact in dispute between the parties, the Judge should leave that question to them, telling them if they should find in one way as to that fact, then, in his opinion, there was no probable cause, and their verdict should be for the plaintiff; if they should find in the other, then there was, and their verdict should be for the defendant. In this case there was not one disputed fact. The letter, which was the subject of the indictment, was written by the plaintiff, who was an attorney, at the instance of his clients, but they left it to him to frame it according to his own judgment. His professional character would not protect him from an indictment if the letter was for a purpose and with an intent contrary to law. It was sent to the defendants on the 11th of February. On the 15th of February the summons was issued for them to appear before the Lord Mayor on a charge of obtaining goods under false pretences, and
 *185] on the 18th the parties (the plaintiff attending with his clients) appeared *before the Lord Mayor, and he dismissed the complaint.

There being, therefore, no fact in dispute, it becomes a pure question of law whether, under the circumstances of this case, the defendants had reasonable or probable cause for preferring the indictment against the plaintiff. Independently of the summons and of the proceeding consequent on it, I think the fair conclusion to be drawn from the letter itself was, that it was written to obtain from the defendants a sum of money which the party claiming it had not the least pretence to demand, and if that be so, there was reasonable and probable cause for preferring the indictment. But assuming that, independently of the summons, that point may be doubtful, coupling the other facts with the summons I think there is no doubt whatever.

The case of *Ravenga v. M'Intosh*, 2 B. & C. 693, has been relied upon, and an attempt has been made to draw a general rule from a case in its own circumstances very peculiar and specific. There it was clear from the plaintiff's case that the defendant had no demand whatever on the plaintiff for the sum for which he arrested him; the defendant, therefore, *prima facie*, had no reasonable or probable cause for making that arrest. But his defence was that he acted honestly in arresting, because he proceeded on the opinion given him by his legal adviser, and to show that, he gave in evidence the opinion, founded on a statement made by himself. Such a defence necessarily introduced a question of fact whether he did act honestly on the faith of the opinion which he had
 *186] obtained, believing that the party might lawfully be *arrested. That question, therefore, was unavoidably left to the jury.

LITLEDAL, J. In order to raise the question of probable cause, the facts which are to enable the Judge to decide whether there be probable cause or not, must be first ascertained. In this case, therefore, it was necessary, in the first instance, to ascertain whether the letter was sent by the plaintiff. That was

proved. So was the fact of the summons having issued, and served by the plaintiff, and of the parties having attended, upon that summons, before the Lord Mayor. Then what was there more to be ascertained by the jury? It was not a question of fact for them whether the defendants believed that they had good ground for indicting the plaintiff, but all the material facts being ascertained, it was for the Judge to say whether the defendants had reasonable or probable cause for so doing. It being then a question for the Judge, I think that, independently of the summons, it was sufficiently shown that there was probable cause, but assuming that to be doubtful, the summons makes it clear.

PARKE, J. It having been proved that the plaintiff was the writer of the letter to the defendants, it became a question on the construction of that document, whether there was probable cause for preferring the indictment. I think that of itself was sufficient to justify the charge; and it was for the Judge to construe the written instrument, and to decide whether the letter did not import that the plaintiff was about to accuse the defendants of obtaining goods under false pretences. I think the fair construction of the letter is, that the *party by whom it was written intended to make that charge against the defend- [*187
ants, for the writer speaks of circumstances which render it incumbent on his clients to bring the matter under the notice of the public, and of the serious consequences to the defendants if the money be not paid; and if so, it is also clear that the object in writing was to extort money from the defendants: the letter itself, therefore, afforded a reasonable ground for preferring the indictment.

PATTON, J. The nonsuit was right. There was no fact whatever to leave to the jury. In *Ravenga v. M'Intosh*, the defendant acted upon a document he had obtained from another, namely, the opinion of a professional man given on a statement which he had submitted, and a question of fact arose whether he acted honestly upon the faith of that opinion, or whether he intended it to serve as a colour for the proceedings which he contemplated. Here the question of probable cause depends on a document coming from the plaintiff himself, viz. the letter sent and written by him to the defendant; and the only question is, whether we are justified in point of law in giving to that letter the construction that it contained a threat of charging the defendants with endeavouring to obtain goods under false pretences. The defendants are threatened with serious consequences; the writer of the letter evidently refers to a criminal proceeding, and that must be a prosecution for a false pretence. I concur therefore in thinking that the letter, independently of the summons, showed a reasonable and probable cause.

Rule refused.

*WILKINS and Another v. JADIS. April 20.

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A presentment of a bill of exchange for payment at a house in London, where it is made payable, at eight o'clock in the evening of the day when it becomes due, is sufficient to charge the drawer, although at that hour the house be shut up, and no person there to pay the bill.

THIS was an action by the plaintiffs as endorsees, against the defendant, as the drawer, of a bill of exchange for 850*l.* accepted by one Townsend, payable at No. 15, Godliman Street, Doctors Commons. At the trial before Lord Tenterden, C. J., at the Middlesex sittings after last term, the only question was, whether the bill had been duly presented for payment so as to charge the drawer. Between seven and eight o'clock of the evening of the day when it became due, a notary's clerk went with it to No. 15, Godliman Street. The door of the house being shut, he rang the bell, and knocked, but no answer was given. Lord Tenterden was of opinion that the presentment was sufficient, and a verdict was found for the plaintiff.

Campbell now moved for a new trial. It may be conceded, that if the house had been open the presentment would have been sufficient. A presentment out of the hours of business to a banker in a place where, by the known custom of

that place, all persons of his description leave off business at stated hours, is insufficient; but to an acceptor not so circumstanced, as an ordinary trader, it has been held that eight o'clock in the evening was not an unreasonable hour for presentment, *Barclay v. Bailey*, 2 Campb. 527, *Morgan v. Davison*, 1 Starkie, 114. In both those cases, however, the house was open, and there was a servant *189] of the acceptor at the place where the bill was made payable. Here the holder, by omitting to present till so late an hour, took on himself the risk of finding the house shut up, and no person to pay the bill. A presentment at twelve o'clock at night, clearly would not be sufficient.

LORD TENTERDEN, C. J. As to bankers, it is established with reference to a well known rule of trade, that a presentment out of the hours of business is not sufficient; but in other cases the rule of law is, that the bill must be presented at a reasonable hour. A presentment at twelve o'clock at night, when a person has retired to rest, would be unreasonable; but I cannot say that a presentment between seven and eight in the evening is not a presentment at a reasonable time.

LITLEDALE, J., concurred.

PARKE, J. A bill or note must be presented for payment at a banker's in the usual hours of business, but in all other cases it must be presented at a reasonable time. I think eight in the evening was, in this case, a reasonable hour.

PATTESON, J. The question to be considered is, whether the bill was presented at the place appointed within a reasonable time, not whether any person was there to receive it. I think the bill in this case was presented at a reasonable hour. Rule refused.

*190] *NORMAN v. BELL and Another. April 21.

Where a toll of corn had been customarily taken by dipping into the sack so as to bring out a certain quantity, and the collector varied from the proper mode (by sweeping instead of lifting the toll), so as to take more; Held, that trover lay against him for the excess.

TROVER for wheat, &c. Plea, not guilty. At the trial before Parke, J., at the Carlisle Spring assizes, 1831, it appeared, that in November preceding, the defendant was employed to take toll of corn for the Earl of Egremont in Cockermouth market. The toll was taken by putting the hand into the sack of corn as it stood in the market, taking out a handful, and placing it in a bowl held near the top of the sack: and the complaint in this action was, that the defendant had varied from the mode previously used, so as to bring away a quantity exceeding the lawful toll. The regular mode was described as lifting, that practised by the defendant as sweeping. It was objected, on behalf of the defendant, that trover was not maintainable. The learned Judge overruled the objection, and the jury found a verdict for the plaintiff with nominal damages.

F. Pollock now moved for a new trial. The question in this case is as to the form of action, which has subjected the defendant to the expense of proving title to the tolls, when it ultimately turned out that the real matter of complaint was only an excessive taking. If the defendant had been a wrong-doer in the whole of his proceeding, there would have been no difficulty; but here, the right to some toll being admitted, the action is brought in respect of part of the corn taken. How is that part to be distinguished in a mixed quantity? [LORD TENTERDEN, C. J. The mixing, in the present case, *191] is the defendant's own act.] There are cases where it has been held, that a party mixing his property with that of another, so that they become undistinguishable, shall lose his own; (a) but that has been where the act was altogether wrongful, and not, as in this case, done bonâ fide and with a foundation of right, though in excess. Trover does not lie for an excessive distress; it is true, the reason of this is said to be, that the action in such case must be founded on the statute of Marlbridge,

(a) See 2 Black. Comm. 405, *Warde v. Eyre*, 2 Bulst. 323, Vin. Abr. *Property*, (E).

which gives the remedy, but it may be doubted whether that is the only ground. (a) [LITTLEDALE, J. Suppose a sheriff, having a fi. fa. to execute for 100*l.*, seizes and sells to the value of 200*l.*, will not trover lie?] There the knocking down of each parcel of goods to the buyer is a distinct act; and if the sheriff went on selling after he had received money enough to answer the debt, there would be no difficulty in saying where the injury began. Here that is impossible. If detainue had been brought and judgment obtained, the sheriff would not have known what to deliver to the plaintiff.

Lord TENTERDEN, C. J. The plaintiff, by adopting this form of action, has certainly subjected the defendant to considerable difficulty and expense, in consequence of the generality of the pleadings. On the other hand, the proceeding has its conveniences; but the question is not, now, on which side the advantage preponderates; we must take the law as we find it. The defendant in this case was entitled to take, as toll, a certain quantity of corn, amounting perhaps to a pint. He takes a pint *and a half. There is no doubt that he is a wrong- [*192 doer: the question is as to the form of action. If the declaration had been in trespass, the defendant must have justified by a prescription to take so much corn for toll, and on proof that he had taken more, he would undoubtedly have been liable on account of the excess. If this would have been so in an action of trespass, I think in the present form of action the result must be the same.

LITTLEDALE, J., concurred. (b)

PARKE, J. This case may be made clear by considering how it would have stood if this defence had been specially pleaded in an action of trespass. Suppose, to a declaration in that form, the defendant had pleaded a prescription to take a certain toll of corn, amounting to one handful, and that he took in pursuance of such prescription; and the plaintiff had alleged in his replication or new assignment a taking of two handfuls, or more than one handful, would such replication or new assignment have been good as supporting the declaration, or would it have been bad on demurrer? If bad, the present application is rightly made; if good, it is not; and if the plaintiff, on such pleadings in trespass, would have been entitled to recover, he is certainly entitled to recover in this action of trover; for a plaintiff may always bring an action of trover where an action of trespass de bonis asportatis would lie. Now it appears to me that a replication, in trespass, that the *defendant had taken more than the [*193 quantity claimable under the prescription, would clearly have been sufficient in point of law; and, therefore, this action may be supported.

PATTESON, J. I am as much averse as any one to the generality in pleading, which tends to introduce confusion. But this is a case in which, if the prescription had been specially pleaded in an action of trespass, there can be no doubt what the result would have been; and if the plaintiff would have recovered in trespass on such proceedings, he is also entitled to recover in the present form of action. Rule refused.

(a) See *Lynne v. Moody*, 2 *Str.* 851. •

(b) At the time when this case was decided, the learned Judge expressed some doubt whether the plaintiff ought not to have brought a special action on the case; but on the following day he stated in Court, that, on looking into the authorities, he thought the action maintainable in the present form.

IRVING v. RICHARDSON. April 22.

A mortgagee effected policies at two offices on a ship, valued in each policy at 3000*l.*, and the ship being lost, he received on the two insurances 3700*l.* An action being brought against him by one set of underwriters to recover back their proportion of the sum paid, above 3000*l.*, and the question being, whether the defendant had received more than the actual value of the ship, insurable and insured by him: Held, that it was properly submitted to the jury, whether, in effecting the policies, the defendant meant to insure his own interest only, or that of the mortgagor also: a mortgagee, at least since the register act 6 G. 4, c. 110, not being an owner to any greater extent than that of the value mortgaged, and the mortgagee continuing an owner.

ASSUMPSIT for money had and received; plea, the general issue. At the trial before Lord Tenterden, C. J., at the sittings in London after last Hilary term, the circumstances appeared to be as follows:—The defendant, Richardson, effected a policy of insurance for 2000*l.*, on the ship *Swiftsure* valued at 3000*l.*, with the Alliance Marine Insurance Company, on behalf of which this action was brought by the plaintiff, as chairman, pursuant to act of parliament. The defendant had previously insured the same vessel, valued at the same amount, *194] with another company for 1700*l.* The *ship was lost, and he received the amount of the insurances from both companies, the Alliance not being then aware of the first insurance. It also appeared that the defendant was interested in the *Swiftsure* as mortgagee for the sum of 900*l.*, and no otherwise. This action was brought by the Alliance company to recover their proportion of 700*l.*, the excess of the sum received by the defendant on the two policies above 3000*l.*, which they alleged to be an over payment. On behalf of the defendant, evidence was given that the full value of the vessel exceeded the amount insured, and it was contended, that the mortgagee was therefore entitled to retain that amount, though above the valuation in either policy, to which point *Bousfield v. Barnes*, 4 Camp. 228, was cited. Lord Tenterden, C. J., thought that case not applicable to the present; there the assured sought to recover 600*l.* on a policy upon a ship valued at 6000*l.*, and it was objected that he had already received 6000*l.* on a policy effected with another office on the same ship valued at 8000*l.*: and it being proved that she was really worth 8000*l.*, Lord Ellenborough held; that he might recover the 600*l.*: but here the value stated in both policies was the same, viz. 3000*l.*, and the defendant claimed to receive in the whole, 3700*l.* Lord Tenterden, however, left it to the jury to say whether the insurance effected by the defendant was intended to cover the defendant's own interest only as mortgagee, or that of the mortgagor also. In the latter case, if *Bousfield v. Barnes* was applicable, the defendant would have been entitled to a verdict, as the sum received by him would not have exceeded the actual value of the interest protected by the two policies. The jury thought *(and there was *195] some evidence to warrant the conclusion) that the defendant only meant to insure his own interest as mortgagee; and on that ground they gave a verdict for the plaintiff for 286*l.*

Campbell now moved for a new trial, on the ground of misdirection. The defendant, as mortgagee, had a right to insure the whole value of the ship on his own account as legal owner; this was taken for granted, with respect to goods and freight, in *Smith v. Lascelles*, 2 T. R. 187; and having, in fact, insured to the extent of that value, he would have been entitled to recover the full amount in actions against the two sets of underwriters, notwithstanding the objection taken by the present plaintiffs. It ought not to have been left to the jury as a question, whether, having so insured, he did so on his own account, or on that of the mortgagor, who had merely an equitable interest. [PARKE, J. Does not the register act, 6 Geo. 4, c. 110, s. 45,(a) decide this point?] That clause was framed alio intuitu; it was intended for the benefit of mortgagees, to obviate questions respecting their liability as owners, for wages, repairs, or *196] the consequences of accident. [Lord TENTERDEN, C. J. The effect of the clause may go beyond what was originally intended.]

Lord TENTERDEN, C. J., having read over the evidence given at the trial,
LITTLEDALE, J. I am of opinion that this case was properly left to the jury.

(a) Which enacts, that when any transfer of a ship, or share or shares thereof, shall be made only as a security for the payment of debts, either by way of mortgage or of assignment to trustees for sale, an entry to that effect shall be made in the registry book and in the endorsement on the certificate of registry; "and the person or persons to whom such transfer shall be made, or any other person claiming under him or them as a mortgagee, or a trustee only, shall not by reason thereof be deemed to be the owner or owners of such ship or vessel, share or shares thereof; nor shall the person or persons making such transfer be deemed by reason thereof to have ceased to be an owner or owners of such ship or vessel, any more than if no such transfer had been made, except so far as may be necessary for the purpose of rendering the ship or vessel, share or shares, so transferred, available, by sale or otherwise, for the payment of the debt or debts for securing the payment of which such transfer shall have been made."

Before the late registry act the mortgagee of a ship was, in point of law, the owner, and might insure to the full extent of the ship's value to the mortgagor as well as to himself. But by the statute the interests of mortgagor and mortgagee are more distinctly severed than they formerly were. The mortgagor, now, does not cease to be an owner. In order, therefore, that the defendant in this case might not keep possession of a sum exceeding not only the value stated in the policies, but also the amount of his interest, it became necessary to ascertain what it was that he had in reality insured; and with this view it was rightly put to the jury whether, in effecting the policies, he intended to insure the whole interest in the vessel, or merely the amount of his own as mortgagor.

PARKE, J. I am of the same opinion. The mortgagee of a ship, at least since the statute, has a distinct interest from that of the mortgagor, to the extent, *prima facie*, of the value mortgaged. The case, therefore, was rightly left to the jury.

PATTESON, J. The defendant, if he had been suing on one of these policies in respect of his interest as mortgagee, must have averred that he was interested to the amount insured; and could not have recovered the *sum here in dispute, if it had been an excess above the value mortgaged. It was, [*197 therefore, a proper question for the jury in this case whether he intended to insure that amount only, or the value of the ship to both the parties interested.

Lord TENTERDEN, C. J., concurred.

Rule refused.

The KING v. The Inhabitants of WIX. April 23.

The Court will grant a mandamus to the inhabitants of a parish liable to contribute to the church rate, to meet and assemble together with the minister, to elect churchwardens.

The return to such a mandamus stated an immemorial custom in the parish to have no churchwarden, and that the duties appertaining by law to the office of churchwardens had been from time out of mind discharged by the overseers of the poor: Held, that inasmuch as overseers had not existed time out of mind, and as there were necessary duties appertaining to churchwardens, and there must have been some persons bound by law to discharge those duties, the custom set out in the return was bad.

The operation of the statute 1 W. 4, c. 21, s. 6 (authorizing the Court at their discretion to grant the costs of applications for mandamus, and of the writ, if issued and obeyed), is confined to cases where the application was originally made after the act came in force.

A RULE nisi had been obtained for a mandamus to the defendants, parishioners of the parish of Wix, in the county of Essex, liable to contribute to the church rate, to meet and assemble together in the vestry, with the minister of the parish, to elect and choose two fit and proper persons to be churchwardens of the parish.

F. Pollock, in Hilary term, 1830, showed cause. The court will not grant a mandamus to the inhabitants of a parish. In an Anonymous case, 2 Str. 686, a mandamus was moved for, directed to the churchwardens of St. Botolph, Bishopsgate, commanding them to call a vestry in Easter week for the election of churchwardens; but the Court refused it, saying, there was no instance of such a mandamus; and they could not take notice who had a right *to call the vestry, [*198 and, consequently, did not know to whom it should be directed. That is an express decision of the point by this Court. The difficulty suggested in that case applies to the present; for to whom can the writ be directed? It must be to the persons who are to obey it. The person who has assumed the office of churchwarden(a) has no power to call a parish meeting, neither has the minister nor the overseers. The persons to obey the writ (if anybody is bound) are the inhabitants at large; and as the parishioners are not a corporation, it must be directed to every individual by name who occupies rateable property in the parish, and then, by what legal means are they to be called together for the purpose of doing the act? The case of *Stutter v. Preston*, Str. 52, may be relied upon in

(a) See the recital of the writ, p. 200.

support of the present rule. That case was in the Court of Common Pleas, a Court which has no jurisdiction in granting a writ of mandamus. A prohibition was there granted to the spiritual court, where the defendant was libelled for not appearing to take upon himself the office of churchwarden, notwithstanding he had been appointed to the office by the ordinary; and it was held, that though the parson and parishioners neglect for ever so long a time to choose churchwardens, yet the ordinary has no jurisdiction, for churchwardens were a corporation at common law, and the proper way, the Court said, "is to take a mandamus from the King's Bench." The question could not possibly be for the Court of Common Pleas, which had no jurisdiction, whether a mandamus could be granted for an election. What is there said amounts only to an obiter dictum, and is a mere *suggestion of what another Court, having jurisdiction to

*199] grant the writ, would be likely to do.

Patteson, contra, relied on *Stutter v. Freston*, Str. 52, as showing the opinion of the Judges on the subject. The ecclesiastical court has clearly no jurisdiction. Where there is no other remedy, the only course is by mandamus. In the Anonymous case, Str. 686, the writ was refused, because the Court could not take notice who had a right to call a vestry. [Lord TENTERDEN, C. J. Is there any precedent of a mandamus to the inhabitants of a parish?] None has been found; but it may issue on the same principle as the inhabitants of a parish may be indicted for not repairing a highway. [Lord TENTERDEN, C. J. That is quite a different proceeding.] If the inhabitants on an indictment for not repairing a highway do not appear to plead, a distringas may issue. So here they may be attached if they do not obey the mandamus.

Lord TENTERDEN, C. J. The difficulty is, to whom such a mandamus can be directed, and how we are to enforce obedience to the writ in case no return is made.

Cur. adv. vult.

On a subsequent day in the term, Lord Tenterden said, that the Court had considered the case, that precedents(a) had been found for a mandamus to

*200] parishioners, and that they thought it fit the rule should be made absolute.

Rule absolute.

The writ having issued direct to the parishioners, recited "that within the parish there of right ought to be two churchwardens, to be chosen in Easter week in every year by the joint consent of the minister and parishioners of the parish, if it may be; but if the said minister and parishioners cannot agree upon such a choice, then the minister of right ought to choose one of such churchwardens, and the parishioners the other. The writ then stated that the King had been informed that at a meeting holden in the vestry of the parish on Monday in Easter week, 1829, T. Scott, clerk, then being curate and minister of the parish, and the parishioners met and assembled in such vestry, could not agree upon the choice of two fit and proper persons to be churchwardens of the parish for that year, and thereupon, T. Scott, so being then curate and minister of the parish, in due manner chose one J. D., a fit and proper person, to be one of the churchwardens of the parish, and the parishioners present at the meeting were required to choose another fit and proper person to be the other churchwarden, but that they unlawfully and contemptuously refused so to do." It then commanded the parishioners to meet, &c. The return to the mandamus stated, "that there now is, and from time whereof the memory of man is not to the

*201] contrary, hath *been an ancient and laudable custom, used and approved of within the parish, to have no churchwardens or churchwarden of and for the parish, and that the duties appertaining by law to the office of churchwardens have been from time out of mind, and still are within the parish duly discharged by the overseers of the poor of the parish, without this, that within the

(a) In M. 10 G. 2, a mandamus was granted to the churchwardens and overseers of the poor of the parish of St. James, Clerkenwell, and to the principal inhabitants thereof, to assemble together in the parish church to make rates and collect the money for repairing the church; and in R. 1 G. 3, a mandamus was granted to the vicar, churchwardens, and parishioners of Croydon, to hold a vestry, and nominate ten persons, out of whom trustees were to choose collectors of a rate for the repair of the church.

parish there of right ought to be two churchwardens of and for the parish, to be chosen in manner and form as in the said writ is in that behalf suggested, and therefore the parishioners of the parish have not elected and chosen nor ought they to elect and choose any person or persons to be a churchwarden or churchwardens of the said parish, in manner and form as by the writ they were commanded." In the present term,

Comyn was heard against the return. The return is bad. The custom set out to have no churchwarden is illegal. The return states that the duties have been immemorially discharged by the overseers. [Lord TENTERDEN, C. J. When overseers have not existed time out of mind. The return admits that there are duties appertaining to churchwardens; and if that be so, it cannot be law that there should be no person bound to discharge those duties, to take care of the church, its ornaments, &c. There may be instances where there have been no churchwardens in fact, but the law requires that there should be such officers.]

Deacon, contra. No statute positively declares that a parish must have churchwardens, nor is there any decision to that effect. The eighty-ninth canon indeed says, "all churchwardens shall be chosen by the joint *consent of the parson and parishioners;" but it does not order in express terms that [*202 there shall be churchwardens in every parish; it merely prescribes a particular mode of election in parishes which have churchwardens. Yet even if it had declared positively that there should be churchwardens in every parish, it would not have been compulsory on the inhabitants of a parish to elect them, for the canons are not binding on the laity; *Dawson v. Fowle*, *Hardres*, 378; the churchwardens of *Northampton's case*, *Carthew*, 118; and a custom will prevail against the canon, *Anonymous*, 1 Ventr. 267. It has been decided also, that there may by custom be only one churchwarden in a parish, notwithstanding that in the statute of Eliz. and the eighty-ninth canon mention is made of churchwardens in the plural, *Rex v. Hinckley*, 12 East, 365, *Rex v. Earl Shilton*, 1 B. & A. 275, *Rex v. Catesby*, 2 B. & C. 814. [Lord TENTERDEN, C. J. Who is to see to the repairs of the church, if there are no churchwardens?] The churchwardens themselves have no power in the first instance to make any rate for the repair of the church; their duty being to summon the parishioners for that purpose, who may in fact make such rate independently of any control from the churchwardens, *Watson's Clergyman's law*, c. 39, *Gibson's Codex*, p. 196. But there is no need for this mandamus to provide for the repairs of the church, for the spiritual court may compel the parishioners at large to repair, and may excommunicate every one of them till it is repaired, *Watson*, c. 39. But supposing that every parish is by the common law compellable to have churchwardens, why should a custom not be good for a parish to have none? as well as the *custom of gavelkind or borough-English, both of which are [*203 in derogation of the common law. It does not affect the validity of custom, that it is unusual or inconvenient; thus a custom, for the inhabitants of a hundred not to serve on juries out of the hundred, has been held good; *Rex v. Pugh*, 1 Doug. 188.

He then contended the writ should be quashed quia improvidè emanavit, and relied on the authorities cited in showing cause against the rule for the mandamus. He also urged the difficulty as to the parties to whom the writ could be directed, and the want of means of enforcing obedience to it.

Lord TENTERDEN, C. J. The writ may be directed to the inhabitants; and those inhabitants on whom it is served may be punished for disobedience. If the Court think the writ ought to issue, they will find some means of enforcing obedience to it. The return must be quashed, and a peremptory mandamus must issue.

LITTLEDALE, J., concurred.

PARKE, J. In case of disobedience, this Court may grant a criminal information against the inhabitants upon whom the writ is served.

PATTESON, J., concurred.

Return quashed, and peremptory mandamus to issue.

Comyn afterwards applied for costs under the statute 1 W. 4, c. 21, s. 6. But
 *204] the Court thought the section *did not apply to cases where the proceeding for a mandamus had commenced before the act came in force, they therefore refused the application.(a)

(a) The same question as to costs was brought before the Court in the subsequent Michaelmas term, in the case of

The KING v. The HUNGERFORD MARKET COMPANY.

In this case a rule nisi was obtained in Hilary term 1831, for a mandamus to the company to summon a jury (according to the act 11 G. 4, c. lxx., by which the company was established), for the purpose of assessing to the party on whose behalf this application was made, compensation for certain premises of which she was the occupier. The rule was enlarged at the instance of the defendants till Easter term, and was then made absolute. The writ issued, and was obeyed by the company. *Law*, in Michaelmas term, obtained a rule, calling on the company to show cause why they should not pay the costs of the application for a mandamus, and also of the writ. The statute, which came in force March 30th, 1831, provides, in sect. 6, as follows:—"And for making some further provision for the payment of costs on applications for mandamus, be it further enacted, that in all cases of application for any writ of mandamus whatsoever, the costs of such application, whether the writ shall be granted or refused, and also the costs of the writ, if the same shall be issued and obeyed, shall be in the discretion of the Court, and the Court is hereby authorized to order and direct by whom and to whom the same shall be paid." *Follett* showed cause against the rule for costs; and *Law*, in reply, contended that it might at least be made absolute as to the writ, which had issued after the statute came in force; and he observed, that the clause itself seemed to make a distinction between the costs of the application and costs of the writ. The Court, however (Lord TENTERDEN, C. J., PARKER, TAUNTON, and PATTESON, J.), were of opinion that the operation of the clause was confined to cases in which the application for a mandamus originally began after the act came in force. The rule was therefore

Discharged.

*205] *The KING v. The Inhabitants of ENDERBY. April 28.

On appeal against an order of removal, the appellants, to show that the pauper served more than forty days as an apprentice in the respondent parish, with the assent of his master, produced a written paper, purporting to certify that the father of the pauper agreed to give his master eight shillings for the term of his apprenticeship: Held, that, there being nothing to show that the value of the subject-matter of the agreement was 20*l.*, it did not require a stamp.

UPON an appeal against an order of two justices, whereby Joseph Blockley, his wife, and two children, were removed from Heather in the county of Leicester, to Enderby in the same county, the sessions confirmed the order of removal, subject to the opinion of this Court on the following case:—

By parish indentures duly allowed, the pauper was bound on the 18th of July, 1812, to one Thomas Dalby of the parish of St. Mary's, Leicester, framework-knitter, and afterwards, according to the provisions of the act 32 G. 3, c. 57, was assigned on the 6th of April, 1813, to one Samuel Briggs of the parish of Enderby, framework-knitter. The pauper served Briggs in Enderby until the 6th of February, 1815; after which the appellants proposed to show that, by the assent of Briggs, the pauper served more than forty days as an apprentice in the parish of Heather, with his father Samuel Blockley, framework-knitter; but it appeared that the father had signed, and delivered to Briggs, a memorandum, which was unstamped, and was as follows:—

"Agreed, Feb. 6th, 1815. This is to certify, That Samuel Blockley has agreed to give Samuel Briggs, master of Joseph Blockley, his son, the sum of 8*s.* for the time of his apprenticeship."

The sessions refused to receive any parol evidence of the assent of Briggs to the service with the pauper's father, on the ground that there was a written
 *206] *agreement; and they refused to receive the written paper because it was unstamped.

Humphrey in support of the order of sessions. By the statute 48 G. 3, c. 149, sched. part 1, tit. *Agreement*, any agreement made in England, where the mat-

ter thereof shall be of the value of 20*l.* or upwards, whether the same shall be only evidence of a contract, or obligatory upon the parties from its being a written instrument, &c., is subject to a certain stamp-duty. The subject-matter of the agreement in this case was not the 8*s.* only, but the service of the pauper, and the maintenance of him by the master. The 8*s.* is the balance of an account; one side consisting of the value of the service, and the other of the keep of the apprentice. The value of the service to the master, and of the maintenance and instruction to be given to the pauper, may have much exceeded 20*l.* *Rex v. St. Paul's, Bedford*, 6 T. R. 452, shows that an assignment of this kind must be stamped. [PARKE, J. It lies on you, who insist that a stamp is necessary, to show that the subject-matter of the agreement was of the value of 20*l.*]

Hildyard, contra, was stopped by the Court.

Lord TENTERDEN, C. J. In *Rex v. St. Paul's, Bedford*, the instrument professed to be an assignment of an apprentice, and not, as was there contended, an agreement for the hire of a servant; and on that ground it was held not to be exempted from stamp duty. Here the instrument is different, and there is nothing to show *that the value of the subject-matter of the agreement was 20*l.*; and it does not, therefore, fall within the terms of the schedule [*207 rendering a stamp necessary where such is the value. The case must go back to the sessions, in order that the evidence may be received.(a)]

LITTLEDALE, PARKE, and PATTESON, Js., concurred.

Case sent back to the sessions.

(a) This clause (48 G. 3, c. 149, sched. part 1, tit. *Agreement*) is not an exception but a substantive part of the enactment, which is not to operate unless the matter of the agreement be of the value of 20*l.* or upwards. This supposes that the value of the contract is measurable. Per Bayley, J., in *Orford v. Cole*, 2 Stark. 351.

The KING v. The Inhabitants of ALDSTONE. April 23.

An apprentice may gain a settlement by residing in a parish during his apprenticeship forty days, though not within the compass of any one year.

UPON an appeal against an order of two justices, whereby Edward Davison and his wife and children were removed from the township of Hexham, in Northumberland, to the parish of Aldstone, in Cumberland, the sessions confirmed the order, subject to the opinion of this Court on the following case:—

The respondent parish of Hexham established a *prima facie* settlement of the pauper Edward Davison by parentage, in the parish of Aldstone. The appellants then proved, that the pauper E. Davison, when about nineteen years of age, bound himself as an apprentice to John Ostle of North Shields, in the county of Northumberland, ship-owner, by indenture bearing date the 26th of August, 1809, for the term of three years; that in the first year of the pauper's apprenticeship the vessel in which he served was moored for a month in the [*209 *township of Middlesborough, in the county of York, which township separately maintains its own poor; and that in the second year the same ship, in which the pauper still continued to serve, was moored in the said township of Middlesborough for five weeks, and that during the said month and five weeks he slept on board the ship. The question for the opinion of this Court was whether the pauper E. Davison gained a settlement in Middlesborough, under the indenture of apprenticeship, the forty days of his residence in that township not having been in one and the same year of his apprenticeship.

N. R. Clarke in support of the order of sessions. The pauper did not gain any settlement in Middlesborough, because he did not serve there under the indenture for forty days in any one year. In *Rex v. Rustington*, 6 M. & S. 398, Bayley, J., states the law to be that an apprentice is settled in the parish where he sleeps the last night of his apprenticeship, if he has slept there altogether during

the year for forty nights. *Rex v. Denham*, 1 M. & S. 221, and *Rex v. Findon*, 4 B. & C. 91, show that the forty days' residence, necessary to confer a settlement by hiring and service, must be within the compass of a year; and there is no ground for distinction in the case of apprenticeship.

Rogers, contrâ. This case has been argued on two grounds; first, the dictum of Bayley, J., in *Rex v. Rustington*; and, secondly, the analogy to cases of hiring and service. Now, with regard to the first, what was said by the learned Judge was extrajudicial, and unnecessary for the decision of the case then before the *Court: it was consistent with that decision that the Court might *209] have thought the residence in St. Thomas à Becket sufficient to give a settlement, if it had not been for the subsequent residence in Newhaven, which, although it did not confer a settlement there, on account of the certificate, prevented any from being acquired in St. Thomas à Becket. It was said in that case, that the residence in St. Thomas à Becket was not sufficient to be considered an abandonment of the certificate, which may be conceded, for a residence may be sufficient to gain a settlement, though not to operate as an abandonment of a certificate. Then is this dictum of the learned Judge supported by any principle or authority? It is said that it may be sustained by analogy to the cases of hiring and service. But in those cases two things are necessary for a settlement, service for a year, and a residence in a parish under that service for forty days; it is evident, therefore, that the forty days' residence must be within that period the service for which constitutes the foundation of the settlement. Besides, if a man continues for many years in the same service, a new hiring is presumed at the commencement of every succeeding year. Lord Ellenborough, in delivering the judgment of the Court in *Rex v. Denham*, which first established that the forty days in cases of hiring and service should be within the compass of a year, when stating the principle upon which the opinion of the Court was founded, says, "The legislature by requiring a hiring for a year, and a continuance and abiding in the same service for one whole year, seem to have contemplated something which was not to be complete in less than a year, but which was to be complete in that period. But a contract of apprenticeship is an entire thing, and *210] the law does not notice any division of it into years. In *Rex v. Sandford*, 1 T. R. 281, the point was brought distinctly before the Court; and it was expressly stated by Willes and Buller, Js., that the latter part of the service might be connected with the former, though the two portions of residence had not been in the same year. In *Rex v. Great Bookham*, Caldecott, 290, the reporter seems to think the point fully settled; and in *Rex v. Brighton*, 5 T. R. 188, the Judges, speaking of an apprentice, say, that he gains a settlement by the last day's service, provided there be altogether forty days' residence in the service in that place. In *Rex v. Barmby in the Marsh*, 7 East, 381, also, that was recognised as the law. But the present point seems to have been expressly decided in *Rex v. Gainsborough*, Burr. S. C. 586. There the residence was for upwards of forty days in the parish, at many different times during the continuance of the indentures, which was for three years and a half, and it was considered to be sufficient. The analogy between this class of cases and those of residence upon a man's own estate is more complete than with those of hiring and service; because, in cases of residence upon an estate, the law has not affixed any particular time during which a man must be possessed of his estate; and there it has been held that forty days' residence in the whole is sufficient, *Rex v. St. Neots*, Burr. S. C. 132; where Lee, C. J. said, "This man resided for forty days off and on for three years," which was sufficient.

Lord TENTERDEN, C. J. This case falls within the decision in *Rex v. Gainsborough*, Burr. S. C. 586. There the pauper, *while apprentice, resided *211] forty days in the whole in West Stockwith, at many different times during a term of three years and a quarter, and was resident nowhere else forty days during that period; and he was held to be settled in West Stockwith.

LITTLEDALE, J. There is a distinction between contracts for service and for apprenticeship. In the former case, there must be a year's service under a yearly

hiring to confer a settlement; the forty days' residence must therefore be within the year. But the service under a contract of apprenticeship has no reference to the term of a year.

PARKE, J., and PATTESON, J., concurred.

Order of sessions quashed.

The KING v. The Inhabitants of HALIFAX. April 23.

An unmarried pregnant pauper was removed by an order of justices from H. to M., and received by the parish officers there. On the following day she clandestinely, and of her own accord, returned to H., where she was delivered of a bastard, before the time for appealing against the order of removal had expired. The bastard was settled where born.

ON appeal against an order of two justices, removing Ann Smith, and Thomas her child, from the township of Halifax to the township of Manchester, the sessions confirmed the order as to Ann, but discharged it as to the child, subject to the opinion of this court upon the following case:—The pauper, Ann Smith, who was settled in Manchester, lived at Halifax in January 1829, and was then pregnant of a child likely to be born a bastard. On the 30th of January, by an order of two justices made before, but executed after, *the Epiphany [212 quarter sessions, she was removed to Manchester, and delivered to the overseers of the poor there. They requested her to go into the workhouse, but she refused, and on the next day (January 31st) returned to Halifax, where she remained till the 20th of February following, and was on that day delivered of a bastard, the child mentioned in the order. The Easter sessions for the West Riding of Yorkshire, in which Halifax is situate, were holden on the 27th of April; and by the practice of those sessions, when an order of removal is appealed against, there must be ten days' notice previous to the sessions; but no notice of appeal was given against this order, nor was any appeal entered against it at the Easter sessions. The return of the pauper, Ann Smith, from Manchester to Halifax was without the concurrence or knowledge of the appellants or respondents, and no fraud was imputable to either.

The point made for the respondents was, that as the pauper, Ann Smith, had been removed after the Epiphany sessions, and had returned of her own accord, and without any notice, into the respondent township, and had been there delivered of the bastard child whose settlement was in question, without the knowledge of the respondents, before the time of giving notice of appeal for the next sessions had expired, the order must be considered as pending, and the settlement of the child must follow that of the mother.

Blackburne in support of the order of sessions. The child was settled where born, according to the general rule with respect to bastards. It will be said that there is an exception applicable to this case; namely, that where the mother is removed from one parish or place *to another, and the child is born while [213 the order of removal is under litigation, its settlement is in that place of the two in which the mother, on the determination of the appeal, would ultimately remain. But the reason of that is, that in such a case the mother is understood to have been at the parish or place to which she was removed, under compulsion of law; and the birth of the child there ought not, consequently, to affect the settlement, if the removal was erroneous. The order and subsequent proceedings having become a nullity, the child is considered as born at that place from which the mother was improperly removed, and where, but for such removal, it is supposed the birth would have happened, *Much Waltham v. Peram*, 2 Salk. 474, *Rex v. Great Salkeld*, 6 M. & S. 408. The same principle may be collected from *Rex v. Martlesham*, 10 B. & C. 77, where a child born pending an order, which was quashed, was held not removable to the mother's *place of settlement*; the place of settlement there not being the place from which she was removed by the order. But the present case is entirely differ-

ent from those. Here the child was not born in the township to which the order removed the mother, but in another place; and if this had happened even during the unavoidable suspension of an order of removal, it should seem that the child would have been settled in the place of birth but for the statute 35 G. 3, c. 101, s. 6, which provides that in such a case the child shall take the legal settlement of the mother. In the present instance the order of removal had been executed; and the woman, having been brought to Manchester, went afterwards of her own accord to Halifax, where she was *214] delivered. She was *not there under compulsion of law: by that compulsion, if it had been effectual, she would have been at Manchester. It is true she returned to the place whence she was removed; but there is no ground for a distinction on that account. It is the same as if she had gone away to any other place after the execution of the order. In the absence, therefore, of fraud on the part of the appellants, the general rule must prevail.

Milner, contra. The child must take the mother's settlement. An order of removal must be considered as pending till the time for appeal has elapsed: this is the rule of convenience, and it is so considered in the direction to magistrates, 4 Burn's Justice, p. 649 (23d ed.), in the case of persons returning after removal: "It seemeth advisable, if the party returns without a certificate, not to send him to the house of correction till the time for appealing against the order of removal shall be expired; for the sessions may quash the order." In the present case, then, there was a legal process depending; and while it was so, an act done in contravention of it by the party who was its object could not have any effect. The officers of the removing parish had done everything in their power towards executing the order; and ought, therefore, to be secured against any act or circumstance tending to defeat it, and not within their control. This must have been the principle of the decision in *Reg. v. Icleford*, 1 Sess. Ca. 32, 2 Bott, pl. 9 (6th edit.), where an order had been obtained for removing a pregnant woman, but could not be executed on account of floods, and in the mean time *215] she was delivered of a bastard; in which case the Court *held the child to be settled in the place to which the mother was to have been removed.

[Lord TENTERDEN, C. J. There the act of God intervened to prevent the execution of the order.] The principle was, that, there being an order of removal, and the parish officers having done all that lay in them, the parish was protected. [Lord TENTERDEN, C. J. Suppose, in this case, the child had not been born till after the Easter Sessions, would not it then have been settled in Halifax? And there might still be no fault in the parish officers.] Some doubt might be raised as to the settlement in that case, as she would have been guilty of an offence in returning, and would have been in the parish illegally, and as a vagrant. In *Landinaboe v. Much Birch*, 1 Stra. 476, where the mother having been removed from L. to her legal settlement, returned secretly soon afterwards, and was delivered of a bastard, the child was held settled in the parish to which the mother had been removed, not in that to which she had returned. It is true the reporter there questions the decision, and says that the cases on which it turned were decided on the ground of fraud in the removing parish; but in *Much Waltham v. Peram*, 2 Salk. 474 (one of the cases referred to), it does not appear that that was the ground of decision; and in another of them, *Westbury v. Coston*, 2 Salk. 532, Holt, C. J., says: "Though here be no fraud, here was a wrongful removal, and the reversal makes all void ab initio. Fraud or not fraud is not material in this case." In *Jane Gray's Case*, 2 Bott, pl. 8, the pauper, while under removal from one parish to another, was delivered on the way; and the child's settlement was *216] held to be in the place to which the mother *was being removed. There, at the time of the birth, the order was still depending, and the parish officers had done all in their power to execute it. [LITTLEDALE, J. In the present case they had executed the order, and were functi officio.] Not till the time for appeal was expired. [Lord TENTERDEN, C. J. If they had found her in their parish after the execution of the order, they might have sent her back.] On the trial of an appeal, the pauper is always considered to be in the hands of the

appellants, and is to be produced by them on notice. If then they have the possession of the pauper, it rests with them to see that she does not return to the removing parish, and commit an offence.

LORD TENTERDEN, C. J. I am of opinion that the order of sessions was right.

LITTLEDALE, J. It seems to me that in this case the child was settled in the place of its birth, according to the general rule on the subject of bastards. There is an exception to that rule where the child is born while the order is under execution, and before it can be completely fulfilled; the interruption happening by the act of God, and the officers having done all in their power to carry the order into effect: as where the birth takes place on the road, or during detention by floods. But here the order had been executed, and the woman afterwards returned from the appellant to the respondent township, without any fraud on the part of either. It is admitted, that if the child had been born after the time for appealing had expired, the settlement would have been good; and I think it is the same in this case, as there was no appeal depending at the time of the birth. *Landinaboe v. Much Birch seems an authority to the contrary; but the reporter himself questions that case, and admits that it [*217 was not well considered.

PARKE, J. The order in this case had been executed, and the parish officers of Manchester had received the pauper; and after that she returned to Halifax, and was there delivered. The parties stand on just the same footing as if this had happened after the order had been appealed against, and confirmed at sessions. An order can no more be said to be pending during the time in which an appeal may be instituted, than a judgment while a writ of error may be brought. Here was a complete execution of the order; no fraud appears in the appellants, and the overseers of Manchester had no power to detain the pauper there. The order of sessions must, therefore, be confirmed.

PATTESON, J. The order had been completely executed, and was not depending. Although the pauper became a vagrant by returning to Halifax, that can make no difference in the question between these parishes.

Order of sessions confirmed.

*PRICE v. THOMAS.

[*218

By indenture, in the form, and containing the usual covenants, of a lease, A. demised premises to B., and B. and C. covenanted to pay the rent; but C. was not otherwise referred to in the instrument. In an action against C., on the covenant to pay rent: Held, that the indenture was available against him, though stamped as a lease only, and that a deed stamp was unnecessary.

THIS was an action for breach of a covenant to pay rent. On the trial at the last Spring assizes for Shropshire, before Patteson, J., it appeared that by a certain indenture, to which the plaintiff, the defendant, and one Hammond were the parties, and which was in the common form of an indenture of lease, the plaintiff demised a messuage and farm to Hammond at a certain yearly rent. The defendant and Hammond covenanted to pay the rent; but all the other covenants were between the plaintiff and Hammond only. The indenture had a lease stamp of 1*l.* 10*s.*; and it was objected at the trial that this was not sufficient; that the defendant was not a lessee; that the instrument, as far as it regarded him, was a deed merely, and subject, as such, to a stamp duty of 1*l.* 15*s.* The learned Judge thought, as the primary intention was that the instrument should be a lease, the stamp was a proper one. A verdict was found for the plaintiff, but leave given to move to enter a nonsuit.

Campbell now moved accordingly. The covenant in which alone the defendant has joined, is, as regards him, merely collateral to the rest of the instrument: it may be considered, in the suit between these parties, as a separate

deed, or as if all the other covenants of the indenture were struck out. To be available, therefore, in this cause, the instrument should have had not a lease, but a deed stamp.

*219] *Lord TENTERDEN, C. J. If this covenant had introduced matter no way connected with the demise, but wholly distinct and independent, it might then have been said that the plaintiff could not benefit by such a stamp as was affixed to this indenture. But that was not the case. The objection, therefore, cannot prevail.

LITTLEDALE, J. I am of the same opinion. The lease was the principal, to which this covenant was an accessory.

PARKE, J. This covenant was part of the consideration for granting the lease. I think there is no ground for the rule.

PATTESON, J., concurred.

Rule refused.

The KING v. The Inhabitants of QUEENBOROUGH. April 23.

The pauper being the son of a certificated person, residing with his father under the certificate as one of his family, was at the age of eleven years bound apprentice, and served his master in the certificated parish for eight years, when he was removed to the certifying parish, which acquiesced in his removal, and received him as their parishioner. The pauper stayed in that parish about a week, and then returned to his master in the certificated parish, and served him there more than forty days: Held, that the pauper did not gain a settlement by apprenticeship in that parish, inasmuch as the binding was before he became of age.

ON appeal against an order of two justices, whereby Finnis Webb was removed from the parish of Milton next Sittingbourne, in the county of Kent, to the parish of Queenborough, in the same county, the sessions confirmed the order, subject to the opinion of this Court on the following case:—In the year 1775,
*220] *the parish of Queenborough granted a certificate for Robert Webb, the pauper's grandfather, and several individuals of his family by name, to the parish of Milton next Sittingbourne, under which certificate William, one of the persons named, the father of the pauper, has continually from that time hitherto resided in Milton. On the 10th day of July, 1810, the pauper then being about eleven years of age, and residing as part of his father's family under the certificate, was bound without any premium an apprentice to his father's brother, Daniel Webb, an inhabitant of Milton, as a dredgerman, for the term of ten years. His master covenanted in the indentures of apprenticeship to find him in board, lodging, and clothing, and to instruct him in the art and business of a dredgerman; and he continued to serve under the indenture until January 1818, when his master and his family became chargeable to the parish of Milton. The master, having originally resided under the above certificate, and not being then supposed to have acquired a settlement in Milton, was, with his family, removed to Queenborough; but on his arriving there, and an explanation taking place, this order was abandoned. The pauper was afterwards, by another order of removal, bearing date the 5th of February, 1818, removed to Queenborough; which parish acquiesced in his removal, and received him as their parishioner. The pauper stayed at Queenborough about a week, and then returned to Milton, to the said D. Webb, and continued with him there under circumstances which amounted to a service and residence of forty days under the indenture subsequently to his return. He never gained a settlement in any other parish. The
*221] question for the opinion of the Court was, *Whether the pauper gained a settlement in the parish of Milton by the above binding, and the service performed after his removal to Queenborough?

Barnewall, Thesiger, and Starr, in support of the order of sessions. The statute 8 W. & M. c. 11, requires a binding as well as an inhabiting, to confer a settlement by apprenticeship. The binding, as well as inhabitation, ought to have been after the pauper had accomplished his full age; for he could not gain

any settlement in the certificated parish before he became sui juris. *Rex v. Manningtree*, 6 M. & S. 214, is precisely in point. There the pauper, being the son of a certificated person residing with his father under the certificate as one of his family, was, at the age of nineteen, bound apprentice, and served his master out of the certificated parish, and attained his majority about eight months previously to leaving his master's service: during the eight months' time he slept at his father's house in the certificated parish, with his master's consent, for more than forty nights, and on the night before he left the service; and it was held that he did not thereby gain a settlement in the certificated parish.

D. Pollock, and Walsh, contra. The binding was undoubtedly valid for all purposes except that of conferring a settlement in the certificated parish, by a service performed while the certificate was in operation. *Rex v. Manningtree*, 6 M. & S. 214, is distinguishable from the present case; because here the pauper was removed by an order to Qucenborough, and that parish acquiesced in his *removal, and received him as their parishioner. This removal took the apprentice out of the operation of the certificate, and there was subse- [*222] quently a sufficient length of service under the indenture to confer a settlement; unless the fact of the indenture having been made prior to the removal, and while the apprentice was under the influence of the certificate, shall be deemed to prevent the acquisition of a settlement by anything which occurred afterwards.

LORD TENTERDEN, C. J. The binding in this case, having been before the pauper attained his full age, is not distinguishable from that in the case of *Rex v. Manningtree*, where it was held no settlement was gained in the certificated parish. That case must govern our decision in the present instance, unless we can say that a binding which was not available at the time it was made can be rendered so by matter ex post facto. I cannot think that any subsequent act of the parish can have the retrospective effect of making that binding effectual by relation which was not so at the time when it was entered into. The safest course is to adhere to the decision in *Rex v. Manningtree*.

LITTLEDALE, J. No subsequent act of the certifying parish will make the binding valid for the purpose of conferring a settlement in the certificated parish, which was not so at the time when it was made.

PARKE and PATTESON, Js., concurred.

Order of sessions confirmed.

*SUMPTER and Others, Assignees of POUND, v. COOPER. [*223]
April 25.

A debtor deposited the title deeds of houses with his creditor as a security, and afterwards executed an assignment of his interest in the houses to the same party; but this instrument was never registered, pursuant to the statute 7 Ann. c. 20. The debtor afterwards became bankrupt, and the assignment of his effects under the commission was duly registered. The assignees brought an action against the creditor for the rents of the houses which he had received from the time of the assignment made to him by the bankrupt: Held, that although this instrument was void, the rents, which the defendant, being equitable mortgagee, had received, could not be taken out of his hands by virtue of the registered assignment under the commission.

ASSUMPSIT for money had and received, &c. Plea, non assumpsit. At the trial before Lord Tenterden, C. J., at the sittings in London after last Hilary term, the following facts appeared:—In 1827 the defendant and George Pound became the purchasers, in equal moieties, of some houses in the county of Middlesex. The defendant lent Pound 500*l.* to pay his half of the purchase-money. A conveyance of the premises to them was duly executed; and it was agreed between them that the deeds should stand as a security to the defendant for the money he had advanced: they were accordingly left in the possession of the attorney who had acted for both parties in the business, and retained by him for the purpose agreed upon. In March 1828, Pound, being reduced to great diffi.

culties, executed an assignment of his moiety of the houses to the defendant, under circumstances which formed a strong case of fraudulent preference; but this instrument was never registered, pursuant to the statute 7 Anne, c. 20. Pound afterwards became bankrupt. The assignment from the commissioners to the assignees was duly registered. From March 1828, when Pound made over his share in the houses as above mentioned, till the commencement of this action, the defendant received the whole of the rents; and to recover a moiety of these the action was brought.

*224] At the trial several objections in point of law were urged against the claim of the plaintiffs, and particularly that, although the assignment in March 1828 might be void as against that under which the plaintiffs claimed, and which was properly registered, the defendant was still entitled to retain the rents by virtue of the equitable mortgage made to him at the time of advancing the purchase-money. The Lord Chief Justice directed a nonsuit, reserving liberty to the plaintiffs to move to enter a verdict in their favour, if the Court should think the equitable mortgage unavailable. In the present term,

Campbell moved for a rule to show cause why a verdict should not be entered for the plaintiffs on the point reserved; or, why there should not be a new trial. First, as to the latter part of the motion. The defendant, supposing him to have been equitable mortgagee, was not entitled on that account to take the rents and profits, though he might have gone into a court of equity and demanded a legal conveyance. His claim to the rents could only arise by the assignment, which was void. Further, whatever lien the defendant had upon these houses as equitable mortgagee, was merged when he took an absolute assignment of the same property; and by that assignment his title must stand or fall. Then, as to the point reserved. By the statute 7 Ann. c. 20, s. 1, every deed or conveyance affecting lands, tenements, or hereditaments in Middlesex "shall be adjudged fraudulent and void against any subsequent purchaser or mortgagee for valuable consideration, unless such memorial thereof be registered, as by this act is directed, before the registering of the memorial of the deed or conveyance under which such subsequent purchaser or mortgagee shall claim."

*225] Assignees of a bankrupt are purchasers for valuable consideration, *Drury v. Man*, 1 Atk. 95; and therefore, supposing the assignment from Pound to the defendant to have been made *bonâ fide*, and in all other respects unexceptionable, still it would have been void as against the conveyance made by the commissioners to the assignees, which was first registered, though last made, *Doe dem. Robinson v. Alsop*, 5 B. & A. 142. And that being so, can the defendant set up a mortgage without deed to bar the title of the assignees, where a mortgage by deed is insufficient? There appears to have been no decision on the point; but an equitable mortgage seems to fall as much within the mischief of the act as a legal one, and it would be hard that assignees should be placed in a worse situation by one than by the other.

Lord TENTERDEN, C. J. The only question is, Whether, an equitable mortgagee having got possession of the rents and profits, they can be taken out of his hands again?

Cur. adv. vult.

Lord TENTERDEN, C. J., on a subsequent day of the term, delivered the judgment of the Court. We are of opinion that the nonsuit was right. The defendant was the equitable mortgagee of the bankrupt's moiety of the premises, and having received the whole of the rents he would have had an equitable right to retain them against the bankrupt if he had remained solvent, and he has the same right against the assignees, who can only recover that to which the bankrupt was both legally and equitably entitled. As to the statute of Anne, we think it cannot be held to apply to the case of an equitable mortgage. It refers only to the registration of deeds; and where there is merely a lien or equitable mortgage created by the deposit of deeds, there is no instrument to be registered.

Rule refused.

The KING v. The Inhabitants of ST. JOHN DELPIKE. April 23.

The statute 3 G. 4, c. 75, s. 2, enacts, that in all cases of marriage had by license, before the passing of that act, without such consent as is required by 26 G. 2, c. 33, s. 11, and where the parties shall have continued to live together as husband and wife, till the death of one of them or till the passing of that act (3 G. 4, c. 75), such marriage, if not otherwise invalid, shall be deemed valid to all intents and purposes.

Sect. 3 provides "That nothing in that act contained, shall extend to render valid any marriage declared invalid by any court of competent jurisdiction before the passing of that act, nor any marriage where either of the parties shall at any time afterwards, during the life of the other party, have lawfully intermarried with any other person."

Held, that a marriage which would have been void by the 26 G. 2, c. 33, and had once been rendered valid by the second section of the 3 G. 4, c. 75, could not, subsequently, be rendered invalid by the marriage of either of the parties, during the life of the other, with a third person.

UPON an appeal against an order of two justices, whereby Mary Laycock was removed from St. Mary Castlegate, in the city of York, to the parish of St. John Delpike, in the same city, the court of quarter sessions confirmed the order, subject to the opinion of this Court on the following case:—

In the year 1808, the pauper not then being a widow, and being under the age of twenty-one years, intermarried with one James Laycock. This marriage was solemnized by license in the parish church of St. Lawrence, in the city of York, without the consent of the pauper's father, who was then living. She continued to live with James Laycock as his wife till 1825, when she *intermarried with one Thomas Laycock, the said James Laycock then and still being [*227 alive. The question for the opinion of the Court was, Whether the former marriage with James Laycock was or was not valid: if it were declared valid, then the order of sessions was to be quashed; if invalid, then to be affirmed.

Alexander and *Drinkwater* in support of the order of sessions. The first marriage would clearly be void by the 26 G. 2, c. 33, s. 11, but that statute is repealed by the 3 G. 4, c. 75, so far as relates to marriages by license of a party not being a widow or widower under age. The second section of that statute, which passed on the 22d of July, 1822, enacts, "that in all cases of marriage had by license before the passing of that act, without any such consent as is required by the recited statute, and where the parties shall have continued to live together as husband and wife till the death of one of them, or till the passing of that act, such marriage, if not otherwise invalid, shall be deemed to be good and valid to all intents and purposes whatsoever." Here the parties did live together till the passing of the act, and the marriage, therefore, if the case rested there, would be good within that section. There was, however, a subsequent marriage of one of the parties. Now the third section enacts, "that the act shall not render valid any marriage declared invalid by any court of competent jurisdiction before the passing of that act, nor any marriage where either of the parties shall at any time afterwards, during the life of the other party, have lawfully intermarried with any other person." Here one of the parties to the first marriage has *afterwards, during the life of the other party, lawfully [*228 intermarried with another person. The case, therefore, is within the third section, and consequently excepted out of the operation of the second. The third section is not merely retrospective. It is prospective also. [PATTERSON, J. If that be so, until the subsequent marriage took place, it was uncertain whether the first marriage would be good or bad.] If the third section be merely retrospective, there will be nothing to which this clause can apply, for the second section contemplates only the case of parties who have lived together till the death of one of them, or till the passing of the statute; the third section cannot apply to these cases, and it would be difficult to suggest any other to which it could refer, unless prospectively. But the Court will scarcely consider the third section as being wholly useless and unnecessary. This act must be construed as strictly, as it would be, if the question arose upon an indictment for bigamy. [LITTLEDALE, J. There is nothing prospective in the words of the second section, they refer merely to by-gone cohabitation.] Construing the second and

third sections together, there is nothing to render valid a marriage which would be invalid by virtue of the statute 26 G. 2, c. 33, where either of the parties shall at any time afterwards during the life of the other lawfully intermarry with a third person. It is not to be assumed that the legislature cannot have intended a marriage to be valid or invalid according to subsequent events. At common law; an infant married before the age of discretion, might agree or disagree after attaining that age.

Coltman, contra, was stopped by the Court.

*229] **Lord TENTERDEN, C. J.* We must construe the proviso in the third section as intended to apply to cases which occurred before the passing of the 3 G. 4, c. 75. Section 2 applies to marriages which, under certain circumstances, were rendered invalid by the 26 G. 2, c. 33, and which are by that section rendered valid in cases where the parties shall have continued to live together as husband and wife till the death of one of them, or till the passing of that act. The provision in section 3, that "the act shall not extend to render valid any marriage where either of the parties shall at any time afterwards during the life of the other party, have lawfully intermarried with any other person," may have been wholly unnecessary. At the same time it may possibly have occurred to those who framed the act that it might occasionally happen, that one of the two parties to the first marriage might, during the life of the other, have lawfully intermarried with a third, and might afterwards have cohabited again with the original husband or wife, till the death of one, or the passing of the act. I think, however, that clause was introduced only for greater caution, and that we ought not to construe the act so that a marriage may first be treated as valid, and afterwards as invalid. The first marriage, therefore, was valid: and consequently the order of sessions must be quashed.

LITLEDALE, J. The second section renders valid marriages, which by the 26 G. 2, c. 33, would be void. I think the words of that and the following section are, in their natural construction, retrospective. And without express *230] words to a contrary effect, we could not say that *the validity given by this act to marriages was intended to be shifting and uncertain. The proviso in the third section, that "the act shall not extend to render valid any marriage declared invalid by any court of competent jurisdiction before the passing of that act, nor any marriage where either of the parties shall at any time afterwards, during the life of the other party, have lawfully intermarried with any other person," seems to contemplate cases not very likely to happen in conjunction with the circumstances pointed out in the second section. But such cases are possible. Parties might continue to cohabit, yet friends might choose to render the marriage invalid. So the parties to the original marriage might cohabit together, though one had been lawfully married in the mean time to another. But if there could be a floating, shifting validity, the consequence might be, that children might be legitimate one day and not another; and it appears to me that this is not contemplated by the act.

PARKE, J. I think this is a very clear case. The second section renders valid marriages otherwise invalid by the 26 G. 2, c. 33, in cases where the parties shall have continued to live together as husband and wife till the death of one of them, or till the passing of that act. Under that section, therefore, the first marriage would be valid; because here the parties did continue to live together till the passing of the act. Then, the third section enacts, that the act shall not render valid any marriage where one of the parties shall, during the other's life, have lawfully intermarried with any other person. It is said that this clause is pro- *231] spective. If it *be retrospective only, there can be no question in the case. If it be prospective, this absurdity will follow,—that parties, whose marriage is rendered valid by the second section, may at any time they please bastardize their issue, by contracting a subsequent marriage. Such a construction ought not to be given to the words of the act, unless it be absolutely necessary. But then it is said that if the construction be retrospective only, this clause is useless. That would not be a sufficient reason for so absurd a construction as

that contended for by the respondent parish: but in truth the clause is not altogether useless; for two parties may be living together, and yet one have married another person; and this case is provided for by the last part of the third section. The argument assumes that a party cannot commit bigamy, without ceasing to live with his first wife. A man may have continued to cohabit with his first wife till the passing of the act, or the death of one of the parties, and yet have contracted another, and a valid marriage in the meantime.

PATTESON, J. I think the original marriage was rendered valid by the second section, and that the third section has a retrospective operation only; and, therefore, that the marriage of the pauper to Thomas Lacock, after the passing of the act does not take the case out of the second section.

Order of sessions quashed.

*GUTHING v. LYNN. April 25.

[*232

In assumpsit on warranty of a horse, the consideration stated for the warranty was, that the plaintiff would purchase the horse for 63*l.*; but the consideration, as proved, was, that the plaintiff would pay that sum, and, if the horse was lucky, would give the defendant 5*l.* more, or the buying of another horse: Held no variance, the conditional promise omitted in the declaration being too vague to be legally enforced, and not amounting, in point of law, to a promise.

ASSUMPSIT. The declaration stated, that in consideration that the plaintiff would buy of the defendant a certain horse for a certain price or sum of money, to wit, 63*l.*, the defendant undertook that the horse was sound: and it was averred, that the plaintiff, confiding in the promise and representation so made, bought the horse and paid the defendant 63*l.*; but that the horse was not sound. Plea, the general issue. At the trial before Alexander, C. B., at the Lincoln spring assizes 1830, the bargain proved was, for sixty guineas, and that if the horse was lucky to the plaintiff, he was to give 5*l.* more, or the buying of another horse. It was contended, that the contract proved was different from that stated in the declaration, and that there ought to be a nonsuit. The learned Judge refused to nonsuit, but reserved liberty to move, and a verdict was found for the plaintiff. A rule nisi was afterwards obtained for entering a nonsuit on the point reserved, or for reducing the damages; and now the *Attorney-General* and *Balguj* were to have shown cause, but the Court called upon

Clarke, *Humphrey*, and *White* in support of the rule for a nonsuit. There was a fatal variance between the contract alleged and that proved. The consideration for the defendant's undertaking was, sixty-three guineas to be paid, and something more to be done if the horse proved lucky. *The entire consideration ought to have been set forth. *Clarke v. Gray*, 6 East, 564. [*233 In *Churchill v. Wilkins*, 1 T. R. 447, the contract declared upon was, that the defendant should deliver to the plaintiff all his tallow at 4*s.* per stone; in the contract as proved, it was added, that if the plaintiff gave any other person more, he was to give the same to the defendant: and the variance was held fatal. In *Blythe v. Bampton*, 3 Bingh. 472, which was the action on the warranty of a horse, the consideration averred was 55*l.*; that proved, 55*l.*, but 1*l.* to be returned to the plaintiff if the horse did not bring him 5*l.*; and it was held to be a variance, the agreement declared upon being absolute, and that proved conditional. So here, the agreement proved is for something conditional, beyond the payment of 63*l.* In *Cave v. Coleman*, 3 Mann. & R. 2, the contract proved was, that the buyer should give 100 guineas, and 10*l.* more if the horse suited him, and this was held no material variance from the contract alleged, which was for "a large price, to wit, 105*l.*:" Lord Tenterden, C. J., observing, "If the buyer had kept the horse, I do not see how the seller could have maintained any action to recover the 10*l.* The buyer might have said, "The horse does not suit me, but I choose to keep him nevertheless

But here, if an action had been brought for the 5*l.* a jury could have decided whether the horse had proved lucky or not, so as to entitle the plaintiff in such action to "5*l.*, or the buying of another horse:" and although the stipulation to give "the buying of another horse" may appear uncertain and difficult to *234] *be enforced, yet the mention of 5*l.* in the other part of the alternative, would have shown sufficiently what the parties considered such a bargain to be worth. Again, in *Cross v. Bartlett*, 3 Moore & Payne, 537, where the declaration was on a warranty of soundness given by the defendant in consideration that the plaintiff would exchange horses with him, and pay him 25*l.*, it appeared that a further part of the consideration was a warranty by the plaintiff that his horse was sound; and this variance was held fatal, there being, over and above the consideration alleged (as Tindal, C. J., observed), "a personal liability imposed upon the plaintiff, and on which he might have been answerable in damages if his horse should turn out to be unsound." It is true the consideration here is alleged generally to be money, and the particular terms are stated under a *videlicet*; but the consideration was not merely pecuniary; and if it were, yet as it forms a material part of the contract, misstatement of it is not aided by a *videlicet*.

LORD TENTERDEN, C. J. I am of opinion that the rule, as to entering a nonsuit, must be discharged. The substantial and operative part of the consideration is sufficiently alleged in the declaration, namely, that the plaintiff should purchase a certain horse, and pay for it 63*l.* The remaining part, that if the horse proved lucky, the plaintiff should give 5*l.* more, or the buying of another horse, is much too loose and vague to be considered in a court of law. Who is to say under what circumstances a horse shall be said to have proved *235] *"lucky?" The price at which the horse sold would not determine it. Suppose a year passed before the advanced price was obtained; it might then still be a question, whether the bargain had been lucky or not. But admitting that this could be ascertained, how could the contract, to give 5*l.* or the buying of another horse, be enforced? It is at the option of the contracting party to do either; and what could be made of an action for not buying another horse? The party sued might say he was ready to buy, but too much was asked. We must suppose the substantial part of the contract to be that declared upon, and consider the rest as amounting merely to one of those honorary engagements which seem very much to prevail among persons in this way of business.

LITLEDALE, J. I am of the same opinion. The only part of the plaintiff's undertaking which is distinct enough for legal consideration is truly set out, namely, to buy a horse at the price of 63*l.* That is substantially the agreement. The remaining part, which is in the alternative, must be looked upon as honorary. "The buying of another horse" is a term to which we cannot assign any definite meaning.

PARKE, J. Supposing it to be ascertainable under what circumstances the horse would prove lucky, still the undertaking to be performed in that event is incapable of being reduced to such certainty as to form matter of legal obligation. It is in the alternative, to give 5*l.* or the buying of another horse: for *236] this last purchase neither time nor terms are prescribed; nor *does it appear, if the parties differed upon it, how far the plaintiff was to continue liable. I think the declaration was supported.

PATTESON, J., concurred.

Rule for entering a nonsuit discharged.

Sir HENRY OXFENDEN, Bart., v. PALMER.

A person who pays highway rate within a parish, is not rendered a competent witness by the 54 G. 3, c. 170, s. 9, upon the trial of an issue, whether, within that parish, there is a custom that all persons residing therein, whose duty it is to cause the highways within the parish to be repaired, may take shingle from the sea-beach for the purpose of such repair; the custom not being a matter relating to rates or cesses within the meaning of the act.

TRESPASS for breaking and entering a close of the plaintiff, in the parish of Herne, in the county of Kent, called The Beach, and taking and digging up large quantities of earth, stones, gravel, and shingle there, and taking and carrying away the same. Plea, first, not guilty; secondly, that the close called The Beach was part of certain waste land between high and low water mark, within the parish of Herne, in the county aforesaid, and that within that parish there was an ancient custom that all persons residing within the parish, whose office or duty within the parish might require them from time to time to cause all and every highway and highways lying within the parish to be amended and preserved, should have the right of digging up, taking and carrying away stones, shingle, &c., from and out of the said close in the declaration mentioned, for the purpose of laying and using the same on and about the said highways, for the amendment and preservation thereof, every year, at all times of the year, when and as often as occasion should require. Averment that the defendant, before and at the times, when, &c., in the declaration *mentioned, was one of the surveyors of the highways within the parish, and residing therein; and that his [*237 duty, as such surveyor, required him to cause the highways within the parish to be amended and preserved from time to time as occasion might require. The plea then justified the taking of the shingle for that purpose. Replication denying the custom; and upon that issue was joined. At the trial before Park, J., at the Spring assizes for the county of Kent 1829, the defendant, in order to prove the custom, tendered as witnesses, persons who were occupiers of houses and lands in the parish of Herne, and contributed to the highway rate there; their testimony was objected to, on the ground that they had an interest in the matter in issue, inasmuch as if the custom were established, it would have the effect of diminishing the highway rate in future. The learned Judge was of this opinion, and rejected the witnesses. A verdict having passed for the plaintiff, a rule nisi was obtained in Easter term 1829 for a new trial, on the ground that the witnesses were improperly rejected; and at the sittings in banc, after Trinity term 1830, before Lord Tenterden, C. J., Bayley, J., and Littledale, J.,

Brodrick showed cause. The parishioners rated, or liable to be rated, were properly rejected in this case, inasmuch as by reason of their liability to the rate they had an interest in the matter in issue; for if the custom were established, the highway rates would be diminished, as the materials for repairing the highways would be obtained free of all expense except that of carriage. At common law, therefore, such rated parishioners *would be incompetent. The only question is, whether they are rendered competent by the statute 54 G. 3, [*238 c. 170, s. 9.(a) It will be said that they are within the words denoting the first class of persons mentioned in that section, which are, "that no inhabitant or person rated or liable to be rated to any rates or cesses of any district, parish, &c., or wholly or in part maintained or supported thereby, shall be deemed to be by reason

(a) Sect. 9 enacts, "That no inhabitant or person rated or liable to be rated to any rates or cesses of any district, parish, &c.; or wholly or in part maintained or supported thereby; or executing or holding any office thereof or therein, shall, before any court or person or persons whatsoever, be deemed to be by reason thereof an incompetent witness for or against such district, parish, &c., in any matter relating to such rates or cesses; or to the boundary between such district, parish, &c., and any adjoining district, parish, &c.; or to any order of removal to or from such district, parish, &c.; or the settlement of any pauper in such district, parish, &c.; or touching any bastards chargeable or likely to become chargeable to such district, parish, &c.; or the recovery of any sum or sums for the charges or maintenance of such bastards; or the election or appointment of any officer or officers; or the allowance of the accounts of any officer or officers of any such district, parish, &c.; any law, usage, statute, or custom to the contrary in anywise notwithstanding."

thereof an incompetent witness for or against such district, parish, &c., in any matter relating to such rates or cesses." The question is, whether the custom here in issue was a matter relating to the rates or cesses contemplated in the act. It is material, with a view to a sound construction of this part of the section, to consider the object of the statute and the particular matter to which it related. It is entitled an act to repeal certain provisions in local acts for the maintenance and regulation of the poor, and to make other provisions in relation thereto. The preamble recites, that local acts had passed containing enactments relating to the

*239] maintenance of the poor, varying the general law with respect to particular districts, parishes, &c.; and that it was expedient that some of those enactments should be repealed, and other provisions contained in such acts be made general. The subject-matter of the act was entirely "the poor," and the object was to amend the laws for their maintenance and regulation. Construing the ninth section with reference to the general object which the legislature had in view, the rates and cesses therein mentioned must mean rates and cesses made for the relief of the poor; and then that section will have the effect of rendering competent all persons rated or rateable to the relief of the poor, in all questions relating to the poor rate, and in all the other cases specifically enumerated in that section. The question here was not one which in any degree related to the poor rates, nor is this one of the other enumerated cases, where an inhabitant paying or liable to pay rates is expressly rendered competent. The words of this section, "*wholly or in part supported thereby*," show that the rates and cesses were those intended to support the poor. It may be questionable even whether rate payers are by the first words of the section rendered competent in any cases except those in which the parish is either in form or substance the litigant party: and also, whether the subject-matter in issue must not be one affecting a rate already made; not something which may effect a rate to be made in future. In *Meredith v. Gilpin*, 6 Price, 146, where rated parishioners were held admissible as witnesses for the defendants, the question was one between an individual and the

*240] parish, viz. whether the land belonged to the overseers. If it did, it vested in them as trustees in aid of the poor rate, and this, therefore, in some degree, related to the rate made for the relief of the poor. In *Heudebourck v. Langton*, 1 M. & M. 402, n. (b), Lord Tenterden appears to have held at Nisi Prius, "that the statute rendered inhabitants of a parish witnesses in an action by the surveyor of the highways against his predecessor for penalties for not accounting, and for the balance of moneys in his hands." That is certainly an authority against the plaintiff; but the case was mainly decided on motion for a new trial, on grounds independent of this point. (a)

Spankie, Serjt., and *Comyn*, *contra*. The statute rendered the parishioners competent. It is a well established rule of construction, that the preamble of a statute does not necessarily limit the enacting clause, if the scope and meaning of the words there used admit larger objects than those embraced in the preamble. The ninth section of the statute was intended to remove objections, which, in practice, had been found most inconvenient. It is sufficiently general in its terms to include the present case. The word "cesses" is not usually applied in acts of parliament to denote poor rates. The enumeration of instances is for the sake of example, and not intended to exclude all which are not specified. It would be narrowing the construction too much to confine the operation of the early part of this clause to those cases where the parish is actually a party. In

*241] *Meredith v. Gilpin*, the parish was not in form a litigant party, though it was substantially interested. So it is here. In *Marsden v. Stanfield*, 7 B. & C. 815, the parish was not strictly, though it was substantially, a party. The issue was, whether a certain messuage was situate within a chapelry; and it was held, that a person who occupied rateable property within the chapelry was a competent witness to prove that it was so situate, according to the rule of the common law; and, secondly, if not at common law, that he was rendered competent by the ninth section of the 54 G. 3, c. 170, on the ground that the

(a) See the case, 10 B. & C. 546.

substantial question in the case was, whether the owners of the property were liable to contribute to the rates? and, therefore, it was a question relating to the rates or cesses of the district. It never could have been intended by the legislature, that persons who have a direct interest in the result of the suit should be thereby rendered capable of being witnesses, and that others, whose interest is equally strong, but indirect, should not be so. *Rex v. Hayman*, 1 Moody & M. 401, was the case of an indictment against a private individual for not repairing a bridge, on a liability *ratione tenuræ*. It therefore only incidentally affected the parish, yet the witness was admitted, as being made competent by the statute. [BAYLEY, J. The parishioners were probably the prosecutors.] *Heudebourck v. Langton*, 1 Moody & M. 402, n. (b), was substantially a question in which the parish was interested. But it was, in form, an action between two individuals. Here, if the custom were established, the parishioners would be materially benefited, for the repair of the roads would be effected at a cheaper rate, and that was the species *of interest which the ninth section of the act contemplated. In *Meredith v. Gilpin*, 6 Price, 146, the question was, [*242 whether the land were vested in the overseers of the poor under a local act, by the provisions of which, if they had a right to it, it would be vested in trust for the parish in aid of the poor rates; and it was held, that a rated inhabitant was an admissible witness by virtue of the statute; Wood, B., being of opinion that the matter in dispute was one of those contemplated by the act, since it related to a fund out of which the rates were to be so far diminished. So, the question raised in this action, whether the parishioners, whose duty it was to repair the highways, were entitled to take shingle from the sea-beach, was a matter relating to the rates or cesses; for, if the custom were once established, the materials for effecting such repairs would be procured free of all expense but that of carriage, and the highway rate would be in future diminished. The last-mentioned case, at all events, shows that the clause in question should be construed most liberally with reference to the object contemplated in it. *Cur. adv. vult.*

Lord TENTERDEN, C. J., in the present term delivered the judgment of the Court. We are of opinion that the witnesses were properly rejected. It is quite clear that, at common law, the inhabitants of this parish would not be competent witnesses, because they have an interest, inasmuch as if the custom be established the materials for the repair of the highways will in future be *obtained at little or no expense, and the highway rates thereby be di- [*243 minished. It was contended, however, that the inhabitants were in this case rendered competent witnesses by the statute 54 G. 3, c. 170, s. 9. (His Lordship, after reading the section, proceeded as follows:—) And the case of *Meredith v. Gilpin* was cited as an authority to show that the witnesses were improperly rejected. That was an action of trespass against the overseers of a township, and the principal question was, whether the lands were vested in the overseers under a local act of parliament, and, according to the printed report, the Court of Exchequer determined that the rated inhabitants were not incompetent witnesses on the part of the defendants, the overseers, although the lands, if vested in them, would be vested in trust for the parish in aid of the poor-rates. The Court considered the matter in issue as one relating to the rates. On consideration, we entertain great doubts whether that case was properly decided, and whether, even there, the matter could properly be said to concern the poor-rate within the meaning of the act of parliament. The great object of that act was the poor. Their maintenance and regulation was the matter principally in the view of the legislature. The question raised in the present case was not one which in any degree related to the maintenance of the poor, but to an object perfectly distinct; it was not a case, therefore, within the general mischief contemplated by the legislature, and recited in the preamble. Still the words of the ninth section are large enough to embrace objects not within the preamble; and taken by *themselves, they would seem to render any person liable [*244 to be rated to any rates or cesses of any parish, a competent witness for

or against such parish, in any manner relating to such rates and cesses. We cannot, however, say that the question as to the existence of the custom to take shingle from the sea-beach for the purpose of repairing the highways in the parish, was one which did properly and strictly relate to rates or cesses of the parish, within the meaning of this act of parliament; and if it be not strictly and properly a matter relating to them, it is clear that the persons tendered as witnesses were not rendered competent by the statute. The custom, which was the matter in issue, if it had been established, would not have affected any rate already made, and although it might affect future highway rates, we think that it was not on that account a matter relating to rates or cesses within the meaning of this act of parliament.

Rule discharged.

*245]

*ROGERS v. WOOD and Another.

Upon the trial of an issue in prohibition, whether the usurpation of office in a quo warranto information mentioned was committed out of the jurisdiction of the county palatine, and within that of the city, of Chester; a document from the remembrancer's office of the Court of Exchequer was produced, purporting to be a decree made (after hearing of a complaint against the citizens of Chester, and their answer) by the Lord High Treasurer of England, the Chancellor of the Exchequer, the under-treasurer, and the Chief Baron, with the advice and assent of a queen's serjeant, and the Queen's Attorney and Solicitor-General, and others of the same court: Held, that this document was not admissible in evidence as a decree, because it was not a decree of the Court of Exchequer nor of any court known to the law at the time when it purported to have been made; nor as an award, because there appeared no voluntary submission of parties; nor as evidence of reputation, because the parties making the decree had no knowledge of the subject, except that which they derived in the course of the proceeding.

PROHIBITION. An information in the nature of quo warranto having been exhibited in the court of session for the county palatine of Chester to try the plaintiff's title to the office of mayor of Chester, a plea to the jurisdiction was pleaded, and a rule obtained in this Court for a prohibition directed to the judges and prothonotary of the court of the county palatine, and to the relators, on the ground that the city of Chester, being a county of itself by charter 21 H. 7, was not within the jurisdiction of the court of session for the county palatine, as to offences quasi criminal committed within the city. The rule being made absolute, the plaintiff declared in prohibition. The issue in prohibition was, whether the usurpation of the office in the quo warranto information mentioned, was committed within or out of the jurisdiction of the court of sessions of the county of Chester. At the trial before *Taddy*, Serjt., at the Shropshire assizes 1829, the following documents produced from the decree book in the remembrancer's office of the Court of Exchequer were received in evidence for the defendants:—
 “Civitas Cestr. Memorand. that in this present term of St. Michael, viz. the 9th of November, in the fourth year of the reign of Elizabeth by the grace
 *246] of God, &c., queen of England, *&c., John Webster, one of the aldermen of the City of Chester, John Cowper, another alderman of the said city, and late mayor of the same, Richard Dutton and Thomas Pillers, late sheriffs of the said city, and William Hamnell, now one of the sheriffs of the said city, appeared before the Right Honourable William Marquis of Winchester, Lord High Treasurer of England, Sir Edward Saunders, Knight, Lord Chief Baron, Sir Walter Mildmay, Knight, Chancellor of the Exchequer at Westminster, George Frywell and Thomas Pyme, Esquires, two of the Queen's Majesty's barons of the said Exchequer, John Thockinton, Esquire, justice of Chester, Gilbert Gerrard and William Rosewell, Esquires, attorney and solicitor general unto her Majesty, and also Sir Thomas Saunders, Knight, the Queen's Majesty's remembrancer of the said Court, and other her grace's officers and ministers of the same Court, being present at the dwelling-house of the said Lord Treasurer in London, and then and there the said citizens being upon good ground charged

by the said Lord Treasurer that they by colour of their charter, and also of the offices of mayoralty and of sheriffs, had estranged themselves from the duty which they owed to the royalty and regal jurisdiction of the county palatine of Chester, and refused to obey writs and process to them directed in her Majesty's name under the seal of the county palatine, and that they encroached upon the regality, liberties, and privileges of that county palatine," &c., they, the said citizens, having with them two serjeants as counsel at law, answered by referring to divers charters, and particularly stating that by charter of King Henry VII., the city was made a county of itself, and separated from the county palatine, and that the mayor and sheriffs of the city were the only *judges of all causes arising within the city, and that the city was, by the said charter, exempt from the jurisdiction of the county palatine, and from [*247 all manner of writs and process proceeding out of the Court of Exchequer of the same. The answer of the deputy chamberlain of the county palatine was then stated, alleging that the city of Chester was parcel of the county palatine, &c., before the granting of the charter of Henry VII., and subject to the jurisdiction of the Earls of Chester, which earldom, until there should be a prince, was in the Queen; and although the city was by that charter made a county of itself, as distinguished from the county of Chester, yet it was not exempt from the jurisdiction of the county palatine; in proof of which the deputy and his counsel produced various documents: that the citizens of Chester not having with them their charters to produce, it was *ordered* that the citizens should appear to answer unto such articles as should be in writing laid against them on the first day of the next term, till which time final order in the premises was deferred; and that, in the meanwhile, the jurisdiction of the county palatine should be obeyed: and that the deputy chamberlain should put the articles in writing and give copies to the said citizens. The other document, which purported to be of Hilary term, 5 Eliz., recited that debate, strife, and controversy had been had in this court of exchequer, and that the mayor, sheriffs, and citizens had sent up their recorder, with all their charters, &c., and that the matter had been divers times heard and thoroughly debated before the Marquis of Winchester, Lord High Treasurer of England; Sir Walter Mildmay, Knight, Chancellor of this Court of Exchequer; Sir Richard Sackville, Knight, Under *Treasurer, and Sir Edward Saun- [*248 ders, Knight, Chief Baron of the same Court, by the advice and assent of Thomas Carus, Esq., serjeant at law to the Queen, and G. Gerrard and W. Rosewell, Esquires, her grace's attorney and solicitor-general, and others of the said Court of Exchequer; and it then stated that upon deliberate consideration of the records produced, it appeared that the county palatine, from time immemorial, had been a county palatine, and had regal jurisdiction; that the city of Chester was and is parcel thereof, and the court of exchequer of the said county was the ordinary chancery court of the county palatine; that the chamberlain was the chancellor and chief officer of the said Court, for all causes appertaining to the jurisdiction of chancellor, and that the officers of the city had used and ought to make return of all process to them directed under the seal of the earldom; and then, after adverting to the charter of the city, the document proceeded, "It is ordered, decreed, and declared, that the said city is within and a member of the said county palatine, and the same is and ought to be within and member thereof, and so shall be from henceforth esteemed, used, and taken; and that the officers of the same city shall from time to time make a good and sufficient return of all such writs of corpus cum causa and other writs as shall be to them directed under the seal of the said earldom, according to the tenor of the same writs: that the said court of exchequer is, and time out of mind of man hath been, the chancery court of the said county palatine, as well for the granting of all original process as for proceeding in and determining of traverses and other matters of equity appertaining to the jurisdiction of a chancellor, and that the chamberlain is, and always hath *been, the chancellor and chief officer of the said court of exchequer at Chester. Also, it is further ordered, &c., that the [*249 said mayor and citizens shall and may hold plea by plaint after the course of the

common laws of this realm in their courts of portmote and pentice within the said city of all manner of pleas rising within the liberties of the said city, as well real and personal as mixt (except pleas of dower and right), and of pleas of the crown, according to the tenor and effect of their charters and of the customs of the same city," &c. It was objected by the plaintiff's counsel, that the instrument produced as a decree of the court of exchequer was not a record of that court, but a mere entry of something done by persons, some of whom were judges of the court of exchequer, and others not; secondly, that it was not made in any suit before that Court, of which cognisance could be taken; thirdly, that, if it were to be considered a decree, no bill and answer were proved. The jury found a verdict for the defendants; and a rule for a new trial having been obtained on the above grounds,

Campbell and *J. Jervis* showed cause, at the sittings in banc after Trinity term, 1830, before Lord TENTERDEN, C. J., BAYLEY, J., and LITLEDALE, J. The decree in question was a good decree or judgment of the Court of Exchequer. From *Madox's Exchequer*, c. 21, s. 1, it appears that the Lord High Treasurer, while that office was exercised by one person, was a judge of the Court of Exchequer; with the Chancellor of Exchequer, Chief Baron, and other Barons, and that decrees were made by them with the advice and assent of the King's counsel. The under-treasurer was also then a member *of the Court occasion-
 *250] ally. [*Taunton, contra*, admitted that the Treasurer, Chancellor of the Exchequer, the Chief and other Barons, constituted the Equity Court of Exchequer, but denied that the under-treasurer was a component part of it.] In *Sir Thomas Wroth's case*, Plowd. 459, the following note appears by Saunders, C. B., to whom the report was submitted before it was printed: "That Saunders, C. B., put the other barons in mind of the great assembly of all the justices on the 28th day of April, in the first year of the reign of Queen Mary, of which assembly the said Chief Baron was one, together with Eyre, Master of the Rolls; Baker, under-treasurer of the Exchequer; Griffin, Attorney-General; and Cordel, Solicitor-General; when it was resolved, that patents without the words *pro nobis, hæredibus et successoribus nostris*, being granted for the corporal exercise of an office or service, are good." The case referred to by Saunders, C. B., is reported in *Dyer*, 92, pl. 20. The decree in *Wroth's case* shows that the Queen's Serjeants and Attorney and Solicitor-General were called in, and the opinion of the Judges of C. P., also, taken by the Court of Exchequer, before giving judgment. In *Price's Law and Course of the Court of Exchequer*, book i. c. 2, it is stated, that the Attorney and Solicitor-General were frequently called in in former times with the King's Serjeants and others of the King's counsel, to assist the Court of Exchequer with their advice in matters depending before the barons, which were not mature for judgment: in support of which position the author refers to the forms afterwards cited, in c.
 *251] 14, and to the records of the Court. Then, if the *Court was constituted thus before Elizabeth's time, the plaintiff must show that such constitution had become illegal at the time when the decree was made. As to the form of the document in question, it is true that it appears to be a decree, without bill or answer. It may have come on by way of petition. It is stated by *Madox*, c. 22, s. 8, that the records or bundles made up by the remembrancers of the Exchequer contain, among other things, many entries or memorandums made *pro commodo regis*, to control accomptants, or to save the king's right, either by way of memorandum *pro rege*, or of *loquendum cum rege*, or *loquendum cum justiciario*, or *cum concilio regis*. And among these entries there appear many which concern franchises; as touching the fair at St. Ive belonging to the Abbot of Ramsay; concerning a claim of the Bishop of Lincoln to have the chattels of his men who were fugitives or hanged; concerning certain charters produced at the Exchequer on behalf of Walter de Esselye; concerning the town of Bedford not being tallaged, when the king's and other demesnes were tallaged. The document now in question may be considered as belonging to this class of records. Again, the general jurisdiction of the county palatine

in quo warranto not being disputed; and the controversy being, whether the city of Chester be exempt from that jurisdiction, the question is one of boundary, and this document may be received as evidence of reputation. Besides it may be admissible as an award, for the parties (the city officers on the one hand, and the deputy chamberlain on the other) having appeared must be taken to have submitted their differences to those who made the decree.

**Taunton and Tyrwhitt, contra.* The instrument put in as a decree of the Court of Exchequer was not the regular judgment or decree of any accredited Court, but the order of an anomalous jurisdiction, unknown to the law, and not binding on the subject. The introduction of persons merely laymen to act as judges is a breach of that usage and prescription by which alone the superior courts exist and enjoy authority. This document appears, on the face of it, not to be a decree of the Court of Exchequer, for the under-treasurer with the Queen's serjeants and her attorney and solicitor-general act as component parts of the Court, while the puisne barons, the legal judges of the court, do not appear to have been parties to the final determination. For the words "and others of the Court of Exchequer" will not include persons of superior rank, as judges, where inferior personages have been first mentioned, Archbishop of Canterbury's case, 2 Rep. 46 b, and the Chief and two other Barons are mentioned in the former document, of Michaelmas term, 4 Eliz. Bills in equity in that Court are addressed to the Chancellor and under-treasurer, the Lord Chief Baron, and other Barons, but the offices of Chancellor and under-treasurer have long been united. The under-treasurer in the time of Elizabeth would merely rank among the "other officers and ministers" of the Court, mentioned by Lord Coke, 4 Inst. 104, after the great officers and judges. But in this supposed decree the under-treasurer is made a person of co-ordinate judicial authority with the Treasurer, the Chancellor of Exchequer, and the Chief Baron, whereas he never had any judicial authority; and if he had, he could not act *in the presence of his principal, the Lord Treasurer, or of the Chancellor of the Exchequer. This decree, too, is said to be made with the advice and assent of the Queen's Serjeant and Attorney and Solicitor-General, as if their concurrence were necessary to the proceeding, which would not be the case in any regular judicial act of the Court. The cases in Madox of persons assisting in judgments are from very early times, viz. before the end of Edward II. Though the superior Courts occasionally call in the assistance of the Judges of other Courts in matters of difficulty, the judgment is delivered and entered of record as, and in fact is, that of the Court which so requires assistance. The note cited from Plowden (if implying that the persons there mentioned all acted as judicial officers of the Court of Exchequer) is at variance with Lord Coke, 4 Inst. chap. 11, p. 103, Britton, fol. 2 b, and Fleta, lib. 2, c. 2, all of whom mention the Exchequer as having a distinct jurisdiction, and justices to administer it. And whatever irregularity may be found in Madox to have taken place in the Exchequer before Edward III.'s time is put a stop to by 31 Ed. 3, st. 1, c. 12, touching erroneous judgments in the Exchequer, which shows the barons to be the only persons who gave judgment. This appears also from the case, 4 Inst. 105, of an information on intrusion against Brace, 25 Eliz.; and that the Lord Treasurer who was joined with the barons, had the mere keeping of records; but that is no judicial duty, nor entitling him to act as judge. Again, in 4 Inst. p. 118, it is said that the Judges of the court of equity in the Exchequer Chamber are the Lord Treasurer, the Chancellor and Barons of the Exchequer; and that "generally, their jurisdiction is as large for matter of equity; as the Barons in the Court of Exchequer have for the benefit of the King by the common law."

In the custody from which this instrument came, the bill and answer should be found, if a *suit* had existed with a legal origin. It is merely assumed that the matter came on upon petition. If this supposed decree had its origin in a commission, Scrogus v. Coleshill, Dyer, 175, shows, that when the crown, as was not unfrequent in the Tudor reigns, granted a commission to great personages associated with some Judges to adjudicate a particular case, the Court of C. P.

in that instance disregarded their order, and agreed that a habeas corpus should be granted. The evil of such irregular commissions was early felt, and provided against in criminal matters by stat. West. 2d, 13 Ed. 1, st. 1, c. 29, which provides, that "no commissions to hear outrages or misdemeanors shall be granted before any justices, except in either bench or in eyre, unless it be for an heinous trespass," &c. 2 Ed. 3, c. 2, enacts, that such judges shall be men learned in the law, and none other. For only such commissioners as have warrant of law and continual allowance in courts of justice are to be allowed, and all commissions of new inventions are against law till allowed by statute. 4 Inst. 163. 2 Inst. 51, 478. Com. Dig. *Prerogative* (D 29).

The instrument was left to the jury as a regular judgment or decree in a suit; it was not tendered as evidence of reputation or as an award. The present plaintiff is not party or privy to the suit (if a proceeding instituted as this was can be so termed) in which the supposed decree or award was made. Any parol *255] evidence, on which the tribunal may have come to its *decision, was objectionable as made post litem motam, and the judgment given in consequence can be entitled to no more weight than the testimony on which it was founded.

Cur. adv. vult.

Lord TENTERDEN, C. J., now delivered the judgment of the Court. The question in this case was, whether two documents which had been received in evidence on the trial ought to have been admitted. The question in the cause related to the rights of the county of the city of Chester, as between that city and the county palatine of Chester. The first document purported to be a history of the early stage of certain proceedings had before the Lord Treasurer and other persons there mentioned, and the second to be a decree by the Lord Treasurer and others on the subject-matter of those proceedings: and this last document was undoubtedly a very important one, as showing what were the rights of the corporation of the city, and limiting them with reference to the rights of the county palatine. It was objected that this could not be considered the decree of any court of competent jurisdiction, and therefore ought not to have been received, and we are of that opinion. The document is one of a very irregular character. (His Lordship then stated the substance of the two documents produced, observing that the matter began by parol, upon a charge by the Lord Treasurer against the members of the corporation before him and the other persons mentioned in the first instrument.) Now, one cannot read the names that appear here without seeing that the decree was not that of the Court of Exchequer, nor of any court of justice known at that *time. The judges con- *256] sisted of some persons who were members of the Court of Exchequer joined with others who were not, her Majesty's Attorney and Solicitor-General, and the Queen's Serjeant appearing in a judicial character. It was evidently, therefore, a proceeding before persons not forming any court known to the laws of this country, nor having any competent authority to decide the matter in issue, or to make the decree which they made. It was said that this document might be received as an award made between the parties, or as evidence of reputation. Now, an award must be founded on a voluntary submission, whereas in this case the citizens of the county of the city were not voluntary parties. They were called before the persons who made the decree by an authority which at that time of day they might not think it convenient to resist. Declarations can only be evidence of reputation when made by those who have personal knowledge of the fact. Here the persons acting as judges had no knowledge of the fact, except what they derived in the course of that proceeding. The decree of such persons, therefore, cannot be evidence of reputation. We are of opinion that the documents were improperly received, and consequently the rule for a new trial must be made absolute.

Rule absolute.

*TAYLOR and Another, Assignees of WALSH, a Bankrupt, v. GREGORY. [*257]

In assumpsit, the issue was, whether the action had been commenced within six years, and a verdict was taken for the plaintiff, subject to the opinion of the Court on a special case. It appeared by the case that process had been sued out within six years, in an action corresponding with the present, and continued on the roll down to the first return of Trinity term 1827, when the six years had elapsed; and that a testatum special capias was sued out in the present action, tested on the last return of the same term; but there was no continuance from the first to the last return. The question being, whether on this state of facts, the latter process was sufficiently connected with the former to take the case out of the statute, the Court, after two arguments of the special case, allowed the plaintiffs, on motion, to amend the roll by entering the required continuance.

And it was held, that this proceeding did not entitle the bail to be exonerated, although they had become bail, and had omitted to render the plaintiff, in reliance on the defence under the statute.

The declaration, which originally corresponded with the process, had been amended by a Judge's order, by increasing the damages, and adding counts for interest and commission: Held, that this was no ground for exonerating the bail, the amount of damages being before an arbitrator, who might apportion them so as to prevent the bail being improperly charged.

ASSUMPSIT. Pleas, the general issue, and that the cause of action did not accrue within six years of the commencement of the suit. Replication, that the cause of action did accrue, &c. At the trial before Lord Tenterden, C. J., at the sittings in Middlesex, after Hilary term 1828, a verdict was found for the plaintiffs for 3000*l.*, subject to an award, if necessary, as to the amount of damages, and also subject to the opinion of the Court upon a special case. A full account of the former proceedings in this cause will be found in *Gregory v. Hurrill*, 5 B. & C. 341. By the statement in the special case it appeared, that after the decision in *Gregory v. Hurrill*, the commission of bankrupt against the present defendant, which was there in question, was superseded, and that immediately afterwards, namely, on the 31st of August, 1827, the plaintiffs sued out a writ of testatum special capias against the defendant (therein mentioned as having survived R. L. Hipkins, against whom, together with the defendant, this action was commenced), tested on the *last return of Trinity term, and returnable on the morrow of All Souls. The case then stated, that a [*258 roll of proceedings in the cause was produced and read at the trial, containing entries of the writs of special capias, alias and pluries sued out against Hipkins and the present defendant in 1812 and 1813; a suggestion of Hipkins's death; and continuances on the writ of pluries, brought down to Trinity term 1827: that examined copies of the writs (to which either party might refer in arguing the case), were produced and read at the trial, in which writs, as in subsequent writ of testatum special capias, the promises on which the action was grounded were laid generally from the defendant and Hipkins, and the debt claimed was 1200*l.*, and the damages were laid at the same sum: that in Michaelmas term 1827, a declaration was delivered, corresponding in every respect with the special capias; but, by a Judge's order, this declaration was amended during the same term, by adding counts for commission and interest, and raising the amount of debt and damages to 3000*l.* In Easter term 1830, this case was argued by *Follett* for the plaintiff, and *Campbell* for the defendant, with reference to two points; one of which was, whether or not the action was barred by the statute of limitations. The Court observed on this occasion, that the proceedings were only continued on the roll down to the first return of Trinity term, and that there was no continuance from thence to the last return of the same term, on which the testatum special capias appeared to have issued. They doubted, therefore, whether this latter writ sufficiently appeared to be a continuation of the original suit; and they directed a second argument on this point.

In Michaelmas term 1830, the case was again argued *by *Follett* for the plaintiffs and *Campbell* for the defendant; and it was contended, on [*259 the one hand, that an entry of continuance from one day of the term to another was unnecessary; that it was a matter of evidence whether or not the writ tested on the last return of the term was a continuation of the process brought down

upon the roll to the first return; that under the circumstances of the case the writ itself supplied that evidence, and, if that sufficiently appeared to the Court, it was not then too late for them to order an amendment of the roll by entering the continuance required. On the other side it was urged, that the plaintiffs were bound by their replication to prove that the same action in which their declaration was delivered had been commenced in time to save the statute; that no part of this proof was to be supplied by inference, on the mere suggestion of the plaintiffs; that nothing appeared to connect the present action with the former process, that being terminated on the roll by an entry of *vicecomes non misit breve*, on the first return of Trinity term, after which there was no trace on the roll of any award of further process, nor was it in any way shown that the writ on which the defendant was arrested, and which was not an *alias* or *pluries* writ, had in fact issued in the same action; so that there was nothing to amend the roll by, even if that step should be thought allowable. The Court (having taken time for consideration) recommended that a motion should be made on behalf of the plaintiffs, upon affidavit setting out the facts, for leave to amend the roll by adding a continuance from the first to the last return of *260] Trinity term 1827, or to alter the teste of the writ of *testatum* *special *capias*, issued in the present action. A rule nisi was accordingly obtained in those terms.

The affidavit in support of the rule, sworn by the plaintiff's attorney, after setting out the proceedings between the parties down to the superseding of the commission in 1827, went on to state, that on that event the plaintiffs, for the purpose of continuing the action previously commenced, had, by the advice of counsel, brought down the continuances to Trinity term, 1827, and on the 31st of August prepared a *testatum* writ, grounded on the process formerly issued, so as to be a continuance of the old action, and not the commencement of a new; that great haste was necessary, as the defendant was preparing to leave the country; that the defendant was arrested on the last-mentioned writ, on the 31st of August, and in the following Michaelmas term he perfected special bail; that the plaintiffs declared in the same term, and proceeded in the action without delay; and that they did not add any continuance from the first return of Trinity term, because they were advised by counsel that it was unnecessary. The deponent swore to his belief that the debt was a just one, and stated that the plaintiff had no means of recovering it but by this action, and that they had been put to an expense of 1200*l.* in prosecuting the suit. Affidavits were filed in answer by the defendant's attorney and bail, and these latter stated that they became bail to the sheriff and also above, in the belief that the defendant was not indebted to the plaintiffs, or, if he was so, that the debt was barred by lapse of time; that they were not apprised, either by the form of the process or otherwise, that the action in which the defendant was arrested was the continuation *261] *of a former suit; that the defendant had remained in England a long time after the trial, and might have been rendered by the bail, if they had not, during that time, believed that the plaintiff was precluded from recovering, by the want of proper continuances on the roll, and by the variance between the process and declaration, the one relating to a debt of 1200*l.*, the other of 3000*l.*; and the declaration containing counts for commission and interest, which demands were not noticed in the process.

Campbell and *Richards* now showed cause. This is a novel application, and it is not reasonable that the Court should be asked, in this stage of the cause, to enable the plaintiffs, by altering the roll or the process, to create evidence which did not exist at the trial. And unless the bail are exonerated a great hardship will be thrown upon them, since they rendered themselves responsible under a belief that a good defence could be made on the plea of the statute of limitations, and, in the same persuasion, have suffered the defendant to go abroad.

Follett, contrâ. The application is not to alter the roll, but only to add something which was wanting: and the question is, Whether the plaintiffs have not, in point of practice, a right to make such addition, supposing this action to be

the same with that formerly commenced, which, it may be assumed, is now decided. In this case the defendant was arrested on the testatum capias, and appeared on the return of the writ; and this cures a discontinuance, *Humble v. Bland*, 6 T. R. 255. In *2 Saund. 1, note 1, it is laid down that the bill of Middlesex or latitat ought to be returned and entered on the roll [*262 and continued from term to term down to the suing out of the process actually served; but it is added that "the continuances are mere matter of form, and may be entered at any time; it has even been holden that they may be made by the attorneys in their chambers, *Dacy v. Clinch*, 1 Sid. 52, 257." *Bates v. Jenkinson*, 6 T. R. 257, n., *Wynne v. Middleton*, 2 Stra. 1227, and *Doe d. Mears v. Dolman*, 7 T. R. 618, are among other authorities to the same effect. *Beardmore v. Rattenbury*, 5 B. & A. 452, is in point. There upon an issue like the present, the plaintiff gave in evidence a testatum special capias issued before the expiration of the six years, returnable in Michaelmas term 1820, and returned non est inventus, and then an alias testatum capias issued after the expiration of the six years, returnable in Easter term 1821; and there was no evidence of any writ returnable in Hilary term, and yet, though there was a discontinuance over a whole term, this was held no ground of nonsuit, as the continuances might be entered at any time. As to the alleged hardship upon the bail, if they are entitled to relief they can apply for it on their own behalf. It does not appear that they became bail in reliance on this particular defect; and if they thought the action was barred by the statute, when in point of law it was not, this is no ground for relieving them.

LORD TENTERDEN, C. J. How far the practice of allowing continuances to be entered after the proper *time may be conducive to justice, is not now the question: such is the practice, and if it require alteration the legislature [*263 must interpose. It appears from a number of cases, some of which have been cited, that the courts have been in the habit of allowing continuances to be entered at any time, and I am unable to distinguish this case from others in which that proceeding has been sanctioned.

LITTLEDALE, J. The courts have held that continuances might be put upon the roll, in cases where it is clear a considerable time must have elapsed since they ought to have been entered. It does not appear to me that any injustice will result from that proceeding in the present case.

PARKE, J. If the rule had not been established, I should have felt a great objection to the allowance of a practice which may lead to much abuse. But I am afraid we are bound by the former decisions. It might have been a question before the case of *Beardmore v. Rattenbury*, whether the entry of continuances ought to be allowed for the purpose of connecting process, so as to bar the statute of limitations, after evidence had been gone into upon an issue on that statute. But the last-mentioned case determines that point.

PATTESON, J. *Beardmore v. Rattenbury* is directly in point; and the established practice is as there stated. Rule absolute on payment of costs.

*On a subsequent day of this term the Court, being informed that the necessary continuance had been entered, gave judgment that the verdict [*264 for the plaintiffs should stand, subject to an award as to the amount of damages. In the same term, while the arbitration was still pending, a rule nisi was obtained for entering an exoneretur on the bail-piece, on account of the variances between the process and declaration. The former affidavits were referred to, and others added, in support of the rule, stating as before, that the bail had become responsible under a belief that the action was a new one and barred by the statute. In the following Trinity term,

Follett showed cause. It is true, that where a complete variance appears between the declaration and the process or affidavit to hold to bail, the bail may be exonerated; as in *Tetherington v. Golding*, 7 T. R. 80, where the defendant was held to bail on an affidavit in assumpsit, and the declaration was in trover; and *Wilks v. Adcock*, 8 T. R. 27, where the affidavit was upon a bill of exchange or order, and the declaration was upon an order and not a bill of exchange. Here

the damages in the declaration are larger than the debt sworn to, or the sum specified in the process, and counts have been added on new causes of action, namely, for interest and commission; but the plaintiffs do not seek to hold the bail liable for the additional amount of damages, or upon the added accounts. The damages are under reference, and the arbitrator can find separately for the different *265] causes of action so as not to prejudice the bail. Besides, *this application comes too late. It was held in *Knight v. Dorsey*, 1 B. & B. 48, that a motion could not be made to exonerate bail on the ground of variance, after demand of a plea and time given for pleading.

Campbell and Richards, contra. The Court will not allow the practice of entering continuances after the proper time to work injustice to the bail, which would be the case if this application were rejected as coming too late. The plaintiffs here have declared upon different causes of action from those stated in the affidavit to hold to bail, and in the testatum writ. [Lord TENTERDEN, C. J. The arbitrator may distinguish the causes of action so as to prevent any prejudice to the bail. Nothing is more common at *Nisi Prius* than to request that the jury will give separate damages on different demands. PARKE, J. Or damages on one count only, to avoid a motion in arrest of judgment.] The defendant might perhaps have paid the debt, if the demand had been confined to the original cause of action, whereas in consequence of the addition, he may at last pay nothing: and in this way the bail are prejudiced. The original sum might be 10*l.*, and the additions might raise it to 1000*l.* In *Kerr v. Sheriff*, 2 B. & P. 358, the defendant was held to bail on process in a plea of trespass on the case on promises, and the declaration was in debt. The Court ordered the bail-bond (the condition of which was conformable to the *ac etiam* clause of the *capias*) to be delivered up to be cancelled, observing that the defendant could never be said to be condemned in the action mentioned in the condition, so as to *266] *charge the bail. [PARKE, J. There the variance went to the whole cause of action. The plaintiff could not have recovered for the cause for which he arrested. That is not so here.]

Lord TENTERDEN, C. J. No case is cited in which the bail has been discharged in consequence of an additional cause of action being introduced in the declaration. The increase of the amount claimed above that stated in the affidavit and process need not be prejudicial to the bail, because the arbitrator, if he find for the plaintiffs to the whole amount, may separate the demands. As to the injury which these parties are supposed to receive from the entry of continuances furnishing an answer to the plea of the statute of limitations, that is a matter of which bail must take their chance. It is difficult to say what applications might not be made, if parties were let in to claim relief on such grounds.

LITLEDALE, J. This is a motion to exonerate the bail altogether. If a verdict had been entered generally for the entire sum now demanded, that might have furnished ground for an application on behalf of the bail. But the whole matter is in the hands of the arbitrator, and there is no reason for supposing that they will be prejudiced by the result. As to the suggestion that they became bail relying upon a defence under the statute of limitations, that can make no difference. The defendant might have told them that he meant to plead the statute, and might afterwards have omitted to do so; and yet they would have had no claim to be discharged.

*267] *PARKE, J., concurred.

TAUNTON, J., having formerly been counsel in the cause, gave no opinion.

Rule discharged, without costs.

The KING v. The Inhabitants of PICKERING. April 26.

A tenement consisting of a dwelling-house and thirty-two acres of land was, since the 6 G. 4, c. 57, hired, and occupied, for a year, at an annual rent of 20*l.* and a year's rent paid. Twenty-seven acres of the land were situate in the township of N., and five acres within that of P.: Held, that evidence was admissible, to show how much of the entire annual rent of 20*l.* was paid in respect of the land in N.

UPON appeal against an order of two justices, whereby John Todd, his wife and child, were removed from the township of Pickering, in the North Riding of Yorkshire, to the township of Newton, in the same riding, the sessions quashed the order, subject to the opinion of this Court on the following case:—

Prior to the 6th of April, 1826, John Todd took of Hugh Kirby, a dwelling-house and thirty-two acres of land, at the annual rent of 20*l.*, to be holden from the 6th of April, 1826, for one year then next ensuing. The dwelling-house and twenty-seven acres of land were situate within the township of Newton, and the remaining five acres within that of Pickering. At the period specified, he entered under such yearly hiring, and occupied the whole of the said premises for the said term of a year, and at its expiration paid the said reserved rent of 20*l.*, residing during the whole of such time in the said dwelling-house. It was objected by the counsel for the appellants that there was no evidence of the tenement within the township of Newton being of the yearly value of 10*l.* Whereupon, the counsel for the respondents offered to prove, that the proportion of the *rent payable in respect of the dwelling-house and land in Newton was more than 10*l.* in amount, either by showing the land within Pickering [*268 to be of less value than 10*l.* a year, or by showing the dwelling-house and land within Newton to be of greater annual value than 10*l.* But the sessions refused to admit such evidence. It was also stated, by the counsel for the appellants, that he was prepared to show that the land within the township of Newton was of no greater value than 6*l.* 5*s.* 3*d.* This case was argued on a former day in this term by

Cresswell in support of the order of sessions. The evidence, tendered to show that the annual value of the messuage and land in Newton was more than 10*l.* in amount, was properly rejected by the sessions. Formerly, a party might gain a settlement by renting a tenement and residing in the parish forty days, provided it was of the annual value of 10*l.* The value became frequently a matter in dispute and the source of much litigation. The stat. 59 G. 3, c. 50, substituted the rent agreed upon between the landlord and tenant for annual value, and enacted that no person should acquire a settlement in any parish by reason of dwelling for forty days in any tenement, unless (inter alia) it should be bonâ fide hired by such person at and for the sum of 10*l.* a year at the least, for the term of one whole year. But some doubts still existed as to the necessity of proving the value of the tenement, and in order to obviate more clearly, in all cases, the inconvenience and expense of such an inquiry, the stat. 6 G. 4, c. 57, was passed. It recites that doubts had been entertained whether the stat. 59 G. 3, c. 50, had been effectual for the purpose *of altering the law in respect of proving the annual value of tenements [*269 rented; and by sect. 2 enacts, “that no person shall acquire a settlement in any parish by reason of settling upon, renting, or paying parochial rates for any tenement, unless (inter alia) it be bonâ fide rented by such person, in such parish, at and for the sum of ten pounds a year at the least for the term of one whole year, and the rent for the same to the amount of ten pounds actually paid for the term of one whole year at the least;” and then it concludes with a proviso, “that it shall not be necessary to prove the actual value of such tenement, anything in any act or acts, or any construction or implication from any act or acts, or any usage or custom to the contrary notwithstanding.” The very object of the statute, therefore, was to prevent the litigation which arose from an inquiry into the value of the tenements, either in the case of renting or rating. The question of settlement is made to depend on the simple fact of renting.

Now here, the party did not rent a tenement in the parish of Newton for the sum of 10*l.* a year, but a tenement partly in that parish and partly in another for a larger sum; he, therefore, did not do that which, by the stat. 6 G. 4, c. 57, is expressly made necessary to the gaining of a settlement. [PARKE, J. The tenant of a farm, therefore, for which a rent of 300*l.* or 400*l.* were paid, would not gain a settlement if a single acre were situate out of the parish in which he resides.] That is an extreme case, which may involve an apparent absurdity; but it is not of so much importance whether the party does or does not gain a settlement in a particular place, as that the question should be easily and cheaply decided, and statutes are seldom made with a view to meet extreme cases, but ad ea quæ *frequentius accidunt adaptantur, nor should they *270] be construed with reference to them. One extreme case may be answered by another. Suppose a man to occupy a tenement situate in as nearly as possible equal portions in two parishes, and of the annual value of 19*l.* 19*s.* 11½*d.*, are the sessions to inquire whether the portion in either is of the annual value of 10*l.* per annum? [PARKE, J. The positive value is not material, but the relative value in order to ascertain what rent is paid for each.] It may be quite as difficult and expensive to ascertain the relative as the actual value of the two portions.

Alexander, contrâ. The statute 6 G. 4, c. 57, does not require that the whole of the tenement should be in the same parish. The statute 59 G. 3, c. 50, had required that where the tenement consisted of land, the whole of it should be in the same parish or township as the house wherein the person hiring such land should dwell and inhabit, but that provision is omitted in the subsequent statute. It must be taken, therefore, that that provision was omitted by design, *Rex v. Great Bentley*, 10 B. & C. 520. The construction attempted to be put on the statute in support of the order of sessions would be most unreasonable. A person might take a house and premises and pay 1000*l.* a year rent for it, and if the house were situate in one parish and a yard in another, he could gain no settlement in either. Besides, the statute does not in terms prohibit the giving of evidence of value, but only renders it unnecessary; in a case where the whole tenement is in one parish it is so. Now such evidence would clearly *271] be admissible *for the purpose of showing that the tenement was not bonâ fide hired at the rent stipulated for. *Rex v. Ashfield-cum-Thorpe*, 9 B. & C. 939, per Parke, J. *Cur. adv. vult.*

LORD TENTERDEN, C. J., now delivered the judgment of the Court, and after stating the facts of the case, proceeded as follows:—

It was contended that no evidence of the value of the tenement could be received. The words of the statute 6 G. 4, c. 57, are undoubtedly very strong. The preamble recites, that the settlement of the poor had been made in some instances to depend upon the annual value of tenements which they may have rented, or upon the annual value of tenements in virtue of which they have paid parochial rates, and that the ascertaining such value in such respective cases had given rise to very expensive litigation, and that doubts had been entertained whether the 59 G. 3, c. 50, had been effectual for the purpose of altering the law in respect of proving the annual value of tenements so rented." Then section 2 enacts, "that no person shall acquire a settlement by reason of settling upon, renting, or paying parochial rates for any tenement, unless it shall consist of a separate and distinct dwelling-house or building, or of land, or of both, bonâ fide rented by such person at and for the sum of 10*l.* a year at the least for the term of one whole year, nor unless such house, or building, or land, shall be occupied under such yearly hiring, and the rent for the same to the amount of *272] 10*l.* actually paid for the term of one whole year at the *least." Then comes the proviso that it shall not be necessary to prove the actual value of such tenement. Now it is said that as evidence of the entire value of the tenement as contradistinguished from the rent was not admissible, and no distinction is taken between cases where the whole tenement is situate in one parish and where it is situate in several, the evidence ought not to have been received

in this case; and, consequently, that no settlement was gained in the parish of Newton. The effect of that would be, if the argument were to prevail, that if a party rented land in two parishes, for which he paid an annual rent of 300*l.* or 400*l.*, and one acre was in one parish and the residue in the other, he would not gain a settlement in either parish. We think the legislature never could have so intended. The rent stipulated to be paid must be taken, for the purposes of this case, as the criterion of the value of the entire premises; but evidence was admissible to show, that the rent payable in respect of the land in the township of Newton amounted to 10*l.*; that is, supposing the house and all the land to be of the value of 20*l.*, it was a question for the sessions, to consider how much of that sum was paid in respect of the land in Newton. The amount must depend upon the relative quantity and quality of the land in each parish. The case must go back to the sessions, in order that they, taking the entire value of the tenement to be 20*l.* (the annual rent), may ascertain by evidence how much of that sum was paid in respect of the dwelling-house and land in Newton.

Case sent back to the sessions.

*BETTS, Administrator of the Estate and Effects of ALBERT EDWARD HASELAR, v. KIMPTON. April 20. [*273]

The administrator of a husband who survived his wife, and died without taking out administration of her effects, cannot recover her choses in action. For that purpose administration must be taken out to the wife.

SCIRE FACIAS on a judgment. The declaration set out a bond given by the defendant to one Richard Nicoll and Ann then his wife, conditioned for the payment of a certain annuity to Ann during her life by half-yearly payments. It then averred that Richard Nicoll afterwards died, and Ann his widow married one Abraham Hudson; and that the said Abraham and Ann sued the defendant for arrears of the annuity, obtained judgment against him for 2000*l.*, the penalty of the bond, and recovered the arrears; that afterwards, in the lifetime of Abraham Hudson, there issued out a writ of scire facias upon the said judgment, pursuant to the statute (8 & 9 W. 3, c. 11, s. 8), for fresh arrears of the annuity, which were thereupon paid; that Abraham Hudson afterwards died, and the said Ann, his widow, intermarried with Albert Edward Haselar, after which there issued another sci. fa. against the defendant for further arrears, which were thereupon also paid. The declaration then stated the issuing of another sci. fa. for further arrears in the lifetime of Ann, and during her marriage with Haselar, which were also paid, but it did not specify in whose name any of the sci. fas. were sued out; it then averred that another sum, to wit, 125*l.*, of the said annuity, being afterwards due and payable to the said Albert Edward and Ann, the said Ann died, leaving the said Albert Edward her surviving; that the *said Albert Edward made his last will and testament, thereby appoint- [*274] ing an executor, and died; that the executor having renounced, letters of administration, with the will annexed, were thereupon granted to the plaintiff; and that the said sum of 125*l.* was still due and unpaid, contrary to the condition of the said writing obligatory, for which cause the present scire facias was sued out. To this there was a general demurrer. The Court, without hearing *Campbell* in support of the demurrer, called upon

White, contra. The ground of demurrer is, that the plaintiff, not being administrator to the wife, cannot have a scire facias to enforce payment of the 125*l.* which became due by virtue of the bond in her lifetime. [LITTLEDALE, J. The judgment was obtained by Abraham Hudson and Ann his wife; and it does not appear that Haselar ever became a party on the record in any of the subsequent proceedings.] After her marriage with Haselar, it is to be presumed that she

would not proceed in her own name merely; he must be supposed to have joined. [PARKE, J. That is not to be taken for granted. Her marriage with him may have been concealed.] The point which this demurrer was intended to raise is, that the husband's administrator is not entitled to sue in this case, inasmuch as the 125*l.* were not reduced into possession during the wife's lifetime. But this is contrary to the rule as stated by Mr. Butler, in his note on Coke upon Littleton, 351 (a). He there says, "By a series of cases it is now settled that the representative of the husband is entitled as much to this species of his wife's property" (choses in action not reduced into possession during her life) "as to any *275] *other; that the right of administration follows the right of the estate, and ought, in case of the husband's death after the wife, to be granted to the next of kin of the husband;" and to this latter point he cites Mr. Hargrave's Law Tracts, p. 475 (note), where it is argued that the right of administering follows the right to the estate. In *Bacon v. Bryant*, 11 Vin. Abr. *Executors*, (K), pl. 25, it is held, "that if a son dies intestate, or a wife, the husband of such wife, and the father of such son, are entitled to the whole of their personal estate, and to administration; and if such husband or father dies before administration granted to them, yet the personal estate of their intestate was an interest vested in them, and shall be part of their personal estate, and administration shall be granted to the representative of such husband or father." *Squib v. Wyn*, 1 P. Wms. 368, *Cart v. Rees*, 1 P. Wms. 378, and *Elliott v. Collier*, 1 Wils. 168, are authorities to show that under such circumstances the right to the wife's choses in action is considered to have vested in the husband as next of kin to her (according to the statute 29 Car. 2, c. 3, s. 25), although he may not have taken out administration, and to be transmissible, notwithstanding, to his executor or administrator. And it appears from *Cart v. Rees*, and the expressions of Lord Hardwicke in *Elliot v. Collier*, that if, in such a case, any other person than the husband's representative takes out administration to the wife, he does so as trustee for such representative. [PARKE, J. In 1 Roper's Law of Husband and Wife, p. 205, n. (a), 2d ed., it is said, that the practice of Doctors' Commons on this point is contrary to the opinion given by Mr. Hargrave in his Law Tracts.]

*276] *Lord TENTERDEN, C. J. The question is, not who is actually entitled to the property, but who has the right to sue for it? Bearing that distinction in mind, it will be found that all the cases agree. In *Squib v. Wyn*, the administratrix of the husband claimed choses in action of the wife whom he had survived; but it appears that administration was taken out not only to the husband, but also the wife *de bonis non*, the husband himself having previously administered in part, so that in any view of the case his administratrix was entitled. And in *Cart v. Rees*, cited at the close of the Lord Chancellor's judgment in the same case, it appears that the wife having died possessed of choses in action, and the husband having also died without taking out administration to her, the wife's next of kin administered *to her*, and in doing so became a trustee for the husband's representative. And where it is laid down that the right of administration follows the right to the property when such right has vested in the husband, that must be understood to mean administration to the wife. In the present case such administration has not been taken out, and the plaintiff, therefore, can have no claim. It stands on well-known principles, that if the husband surviving the wife does not in his lifetime reduce her choses in action into possession, then, although in equity those claiming under him are entitled to them, they must be recovered, not by his representatives, but the wife's, and they will take the property as trustees, for the representatives of the husband.

LITLEDALE, J. The choses in action of the deceased wife can only be *277] claimed by a person administering to *her effects. I think, too, that it is a great question whether a *sci. fa.* could be maintained on the statute 8 & 9 W. 3, s. 11, in right of a person who never became a party to the record. But at all events this plaintiff, by his own showing, has no title.

PARKE, J. I think that, to give Haselar an interest in the judgment, or arrears of the annuity, there should have been a sci. fa., making him a party to the record. It does not appear that he ever became so, and we cannot intend it. With respect to the particular arrears now claimed, it is an established rule, that choses in action of a wife can only be recovered by the husband, after her death, as administrator to her. The cases cited as to the right of the husband and his representatives, apply only to the beneficial interest; and Mr. Butler, in the note referred to, pronounces on the right of administration, but not on the form in which it is to be taken out. If, therefore, the plaintiff could recover these arrears at all, he must do so as administrator to the wife.

PATTESON, J., concurred.

Judgment for the defendant.

*RIGHT, on the demise of WILLIAM JEFFERYS, and Others, v. HENRY BUCKNELL and two Others. [*278]

A. having an equitable fee in certain lands, mortgaged the same to B. by lease and release. The release recited, that A. was legally or equitably entitled to the premises conveyed; and the releasor covenanted, that he was lawfully or equitably seised in his demesne of and in, and otherwise well entitled to the same. The legal estate was subsequently conveyed to A., and he afterwards for a valuable consideration conveyed the same to C. Upon ejectment brought by B. against C.:

Held, first, that there being in the release no certain and precise averment of any seisin in A., but only a recital and covenant that he was legally or equitably entitled, C. was not thereby estopped from setting up the legal estate acquired by him, after the execution of the release.

Held, 2dly, that the release did not operate as an estoppel by virtue of the words, "granted, bargained, sold, aliened, remised, released," &c., because the release passed nothing but what the releasor had at the time, and A. had not the legal title in the premises at the time of the release.

Held, 3dly, that this case did not fall within the rule, that a mortgagor cannot dispute the title of his mortgagee, because C. claimed as a purchaser for a valuable consideration without notice, a legal interest which was not in A. at the time of the mortgage to B., A. having then only an equitable interest, which passed to B., whose title as to that was not disputed.

THIS case was argued during the last term, by *Platt* for the plaintiffs, and *Preston* for the defendants, before Lord TENTERDEN, C. J., LITLEDALE, J., TAUNTON, J., and PATTESON, J. The facts of the case, the arguments urged, and the authorities cited, are so fully stated and commented on in the judgment pronounced by the Court, that it is deemed unnecessary to detail them here.

Cur. adv. vult.

Lord TENTERDEN, C. J., in the course of this term, delivered the judgment of the Court:—

This case came on upon a motion to enter a nonsuit. At the trial before the Lord Chief Justice Tindal, at the Summer assizes for the county of Kent, 1830, it appeared that the action was brought to recover two houses at Brompton in the parish of Chatham. As to one, the learned Judge was of opinion, that the ejectment would not lie for want of a notice to quit. As to the *other, [*279] there was a verdict for the lessors of the plaintiff, subject to leave to enter a nonsuit. The facts proved were, that Thomas Jarvis the elder, having contracted to purchase the premises, was let into possession by order of the Court of Chancery on the 29th of December, 1808; and being let into possession, but never having had any conveyance executed to him, he afterwards, on the 2d of October, 1820, devised them to his son and heir, Thomas Jarvis the younger. Upon his father's death the son entered, and on the 21st of January, 1823, he mortgaged the premises, by indentures of lease and release, to the lessors of the plaintiff. The lease and release were in the common form, excepting that in the latter there was a recital that the said Thomas Jarvis is legally or equitably entitled to the several messuages or dwelling-houses conveyed, and in the covenant for title, the releasor covenanted that he is and standeth lawfully or equitably, rightfully, absolutely, and solely seised in his demesne as of fee of and

in, and otherwise well entitled to the said several messuages or dwelling-houses, &c. On the 1st and 2d of April, 1824, indentures of lease and release, under the contract of sale in 1808, were executed to Thomas Jarvis the younger, whereby he became seised of the legal estate in the premises, which he afterwards conveyed by mortgage, for a valuable consideration, to the defendant Henry Bucknell. There was no proof that Bucknell had any notice of the prior mortgage, and upon his mortgage all the title-deeds were delivered to him. In this action, he had come in under the common rule, and defended as landlord; the other defendants were the tenants in possession.

The question on which the Court took time to consider was, whether the defendant, claiming under the mortgagor Thomas Jarvis the younger, could set up *280] as a *defence against the lessors of the plaintiff, the legal estate acquired by him since their mortgage. And it has been argued for them that he, as representing the mortgagor Thomas Jarvis, is estopped from doing so; and for this purpose, Co. Litt. 352 a, Litt. sect. 693, and the cases of *Bensley v. Burdon*, 2 Sim. & Stu. 519, *Helps v. Hereford*, 2 B. A. 242, *Goodtitle v. Morse*, 3 T. R. 365, *Goodtitle v. Bailey*, Cowp. 597, *Goodtitle v. Morgan and Others*, 1 T. R. 755, *Doe d. Christmas v. Oliver*, 10 B. & C. 181, *Trevivan v. Lawrance*, 1 Salk. 276, 2 Ld. Raym. 1048, S. C., and *Taylor v. Needham*, 2 Taunt. 278, were cited. Of these cases none are applicable to the point in question, except *Goodtitle v. Morgan* and *Bensley v. Burdon* (of which more presently), and *Helps v. Hereford* and *Doe v. Oliver*. The last two are cases of estoppels, arising out of fines levied before any interest vested; and there is no doubt that a fine may operate by way of estoppel, but the present is not the case of a fine. In sect. 693, Littleton, speaking with reference to the doctrine of remitter, says, "This is a remitter to him, if such taking of the estate be not by *deed indented*, or by matter of record, which shall conclude or estop him;" and in Lord Coke's commentary on this passage, a deed indented is distinguished from a deed poll in this particular of remitter, for the deed poll is only the deed of the feoffor, donor, and lessor, but the deed indented is the deed of both parties, and, therefore, as well the taker as the giver is concluded. In 352 a, Lord Coke divides estoppels into three sorts, the second of which he thus defines: "By matter in writing, as *by deed indented*, by making of an acquittance by deed indented or deed poll, by defeasance by deed indented or deed poll." And there are many other authorities *281] *to show that estoppel may be by any indenture or deed poll. But upon this rule there are many qualifications and exceptions engrafted. It is a rule, that an estoppel should be certain to every intent, and, therefore, if the thing be not precisely and directly alleged, or be mere matter of supposal, it shall not be an estoppel; nor shall a man be estopped where the truth appears by the same instrument, or that the grantor had nothing to grant, or only a possibility; Co. Litt. 352 b, where this case is put; "An impropriation is made after the death of an incumbent, to a bishop and his successors. The bishop, by indenture, demiseth the parsonage for forty years, to begin after the death of the incumbent. The dean and chapter confirmeth it. The incumbent dieth. This demise shall not conclude, for that it appeareth that he had nothing in the impropriation till after the death of the incumbent." This passage from Co. Litt. is adopted by Ch. B. Comyns in his Digest, *Estoppel* (E. 2). Now in the case at bar the very truth, that the mortgagor, Thomas Jarvis the younger, had only an equitable interest, is partly admitted; for the recital states in the alternative, that he is lawfully or equitably entitled, and the covenant for title is to the same effect. At all events, there is in this recital a want of that certainty of allegation which is necessary to make it an estoppel. Lord Holt lays it down in *Salter v. Kidley*, 1 Show. 59, that general recital is not an estoppel, though a recital of a particular fact is. And upon this the judgment of the Lord Chancellor in the recent case of *Bensley v. Burdon*, which was relied upon by the counsel for the lessors of the plaintiff, proceeded. The deed of release in that case recited, that Francis Tweddle the younger was, subject to his father's

life estate, seised or possessed *of, or well entitled to, the lands and tenements thereafter mentioned in reversion or remainder; and by the deed [*282 he granted and released this remainder, and covenanted that he was seised of it for an indefeasible estate of inheritance. The present Master of the Rolls, then Vice-Chancellor, by whom this case was first decided, according to the report in 2 Sim. & Stu. 519, held, that this was an estoppel, upon the general ground that it was a deed indented, and that the nature of the conveyance, namely, lease and release, made no difference. The Lord Chancellor confirmed this judgment (5 Russell's Ch. Rep.), but put it on this solely, that it was an allegation of a particular fact by which the party making it was concluded. That case, therefore, greatly differed from the present, in which there is no certain precise averment in the deed of release of any seisin in T. Jarvis the younger, but a recital only, that he was legally or equitably entitled. We think, therefore, that this recital does not operate by way of estoppel.

We are of opinion, also, that the release whereby T. Jarvis granted, bargained, sold, aliened, remised, released, &c., the premises, does not by mere force of these words amount to an estoppel. Littleton lays it down, sect. 446, that "no right passeth by a release, but the right which the releasor hath at the time of the release made. For if there be father and son, and the father be disseised, and the son (living his father) releaseth by his deed to the disseisor all the right which he hath, or may have, in the same tenements, without clause of warranty, &c., and after the father dieth, &c., the son may lawfully enter upon the possession of the disseisor." To the same effect is Wivel's case, Hob. 45, and Perk., sect. 65, *that where a son and heir joins in a *grant* in the lifetime of his father, while he has neither possession nor right in the matter granted, the [*283 grant is utterly void, and nothing passes. So here, if the release pass nothing but what the releasor lawfully had, and he had no legal title in the premises at the time of the release made, those who claim under him by a subsequent good title are at liberty to show this; and there is no implied estoppel, as appears from the authorities just cited, and the year books 49 Ed. 3, 14, 15, 45 Ass. 5, 46 Ass. 5, and Brook's construction of these books in his Abr. tit. *Estoppel*, pl. 146, 10 Vin. Abr., *Estoppel* (M).

The case was put in argument on another ground for the lessors of the plaintiff, namely, that it was within the common rule that a mortgagor cannot dispute the title of his mortgagee. Such a rule without reference to the technical doctrine of estoppel, undoubtedly is to be met with as laid down by Lord Holt, in *Salkeld*, and has been often recognised in modern times. But we are of opinion that it does not apply to the present case. Here, the defendant Bucknell claims, as a purchaser for a valuable consideration without notice, a legal interest which was not in T. Jarvis at the time of his mortgage to the lessors of the plaintiff, and T. Jarvis had then an equitable interest which passed to them, and which is not questioned, nor sought to be disturbed by the defence which Bucknell sets up. This case much resembles that of *Goodtitle v. Morgan*, 1 T. R. 755, where a second mortgagee without notice, who got in the legal title, by taking an assignment, from a trustee and the mortgagor, of an outstanding term assigned to attend the inheritance, was holden entitled to a legal preference against the first mortgagee.

*There, as here, it might be said that he was bound by the same conclusion as the mortgagor, and should not question the right of the prior [*284 mortgagee. But the legal title prevailed there, and so we think it ought here. The consequence upon the whole is, the rule for entering a nonsuit must be absolute. Rule absolute.

LONG v. CHAMPION. April 26.

On the trial of an action at law, a copy of a letter written by the plaintiff's agent, and referred to by the plaintiff in his answer to a bill of Chancery, and the original of which letter, instead of being filed in the Master's office, had, by consent of parties, been deposited for inspection with the plaintiff's clerk in court, in the Chancery suit, is admissible in evidence on the part of the defendant at law, without reading the answer in Chancery.

THIS was an action by the assured against an underwriter on a policy of insurance upon a ship. At the trial before Lord Tenterden, C. J., at the sittings in London after Hilary term 1831, the defendant's counsel offered in evidence a copy of a certain letter written by one Wilkinson, who was the agent of the plaintiff in effecting the insurance, in order to show, that at the time of the insurance Wilkinson had material information respecting the ship insured, which ought to have been communicated to the underwriter. Due notice had been given to the plaintiff to produce the original letter. The copy was obtained under these circumstances:—A bill in Chancery had been filed by one Hobson, an underwriter, on another policy effected on the same ship by Wilkinson, as such agent, against Long and Wilkinson; they put in answers, and, in the schedule thereto, referred to the letter of Wilkinson now in question. Long residing in North America, the original letter was not produced in Chancery, but, to save time and expense, it was agreed between the solicitors of Hobson and Long, *285] that an original letter-book belonging to Wilkinson, and *containing a copy of the letter in question, should be inspected at the office of Long's solicitor on behalf of Hobson, upon the same terms as if the original letter had been deposited in the Master's office and there inspected. An inspection was accordingly had, on behalf of Hobson, at the office of Long's solicitor, and on that occasion the copy was taken, which it was now proposed to read. It was objected that this letter, being in effect part of the answer in Chancery, could not be read unless the answer were put in also; but Lord Tenterden, C. J., overruled the objection, and received the evidence as offered. A verdict having been found for the defendant,

F Pollock, on a former day in this term, moved for a new trial, on the ground that the letter ought not to have been admitted without the answer in Chancery. He stated that this question had never before been discussed in banc, but he mentioned a case which occurred some years ago at Nisi Prius, before Lord Tenterden, C. J., where the defendant (having given the plaintiff notice to produce his books) offered in evidence a copy of one of them, and it turned out, on cross-examination, that the witness had obtained an inspection of the book in the Master's office, where it was deposited by an order of the Court of Chancery, as being referred to by the plaintiff in his answer to a bill, and that on that occasion the copy was made: upon which Lord Tenterden, C. J., held, that this was the same as if the whole book were appended to the answer, or the answer expanded to the extent of the book, and that advantage could not be taken of an inspection obtained through a conventional and economical proceeding between *286] the parties in the Chancery suit, to give in *evidence a part of the answer without reading the whole. He also stated his recollection of other cases to a similar effect at Guildhall and on the Northern circuit. *Cur. adv. vult.*

LORD TENTERDEN, C. J., now delivered the judgment of the Court. It appears to us that there was no sufficient ground for rejecting this evidence. If the letter, instead of being merely handed to the solicitor of one of the parties for the inspection of the other, had been produced in the Court of Chancery, and filed in the Master's office, and the defendant here had wished to offer it as evidence in the action at law, it would have been for the Lord Chancellor to exercise his judgment whether or not he would permit it to be so made use of without the answer to which it related; or if, in such a case, the letter had been produced here without the Lord Chancellor's order, this Court would have determined, in their discretion, upon its admissibility. But in this case the letter was not regularly before the Court of Chancery in the suit there, and we think

it impossible, under the circumstances, that this Court should exercise a discretion as to admitting or rejecting it. The case does not coincide, in point of fact, with that which has been principally relied on. Whether it is necessary in every instance to read an answer in Chancery for the purpose of making any documents evidence which may be annexed to it, we do not now decide. I should at present think it a very strong proposition to say that the answer must at all events be read, though having no connexion with the case in which the documents are produced. But here at least we think the copy in question was admissible without the answer, and that there is no ground for the rule.

Rule refused.

***The KING on the Prosecution of J. HUBBACK, and Others, v. W. H. THOMPkins, R. LYALL, and Others. April 27. [*287]**

Rated inhabitants of a parish, who were prevented by rioters from entering the vestry room to attend a meeting called for the purpose of imposing a church-rate, and who afterwards prosecuted the offenders, are parties grieved within the meaning of the statute 5 W. & M. c. 11, s. 3, and, therefore, entitled to costs on conviction of the defendants after removal of the case by certiorari.

THE defendants having been indicted at the sessions for the borough of Berwick-upon-Tweed for a riot, removed the indictment into this Court by certiorari. They were tried and found guilty at the Northumberland assizes, 1830, and judgment was pronounced in the following Michaelmas term. A side bar rule having been obtained for taxing the costs to be paid to the prosecutors by the defendants; the latter obtained a rule nisi for discharging that rule on the ground that the prosecutors were not parties grieved within the meaning of the statute 5 & 6 W. & M. c. 11, s. 3.(a) It appeared by affidavits on the part of the defendants, that the mayor, bailiffs, and burgesses of Berwick-upon-Tweed had for many years exercised the right of electing churchwardens of the parish, and that the defendants Thompkins and Lyall, together with two others, had been so elected in 1829, when they were sworn in and executed the duties of the office, and that they were elected again in 1830, and sworn in. The affidavits in *answer [*288 to the present rule stated, that some doubts having arisen as to the right claimed by the corporation of Berwick to choose churchwardens, the select vestry had taken the opinion of an eminent civilian, who advised them that the election of churchwardens by the corporation would not be recognised in a court of law, and that the right was in the minister and parishioners. That notice of holding a meeting of the inhabitants in vestry on the 21st of January, 1830, was given for the purpose of choosing churchwardens of the parish, and that a meeting in vestry was duly held on that day, at which the prosecutors were elected and afterwards sworn in. That they (the prosecutors) on the 21st of February, gave notice that a meeting of the inhabitants of the parish would be held on the 25th of February, for the purpose of imposing a church rate; that on that day such a meeting was held in the vestry room, and that at that meeting the riot took place, in respect of which the defendants were prosecuted and convicted. The prosecutors attended that meeting, not merely as churchwardens, but for the purpose of voting as rated inhabitants. The rioters disturbed, protracted, and impeded the meeting, and alarmed the prosecutors; and during the riot, two of the prosecutors, Thompson and Dickson, were violently driven and pushed about by the rioters, who blocked up the entrance to the vestry room by gathering round the

(a) By section 3 of the 5 & 6 W. & M. c. 11, s. 3, it is enacted, "that if the defendant prosecuting such writs of certiorari be convicted of the offence for which he was indicted, then the Court of King's Bench shall give reasonable costs to the prosecutor, if he be the party grieved or injured, or be a justice of the peace, mayor, bailiff, constable, headborough, tithingman, churchwarden, or overseer of the poor, or any other civil officer, who shall prosecute upon the account of any fact committed or done, that concerned him or them as officer or officers to prosecute or present; which costs shall be taxed according to the course of the said Court."

door of the room in a dense body firmly locked together, and thereby and by means of the riot, forcibly and wilfully hindered three of the prosecutors, viz. Thompson, Dickson, and Nicholson from entering the vestry room, which they *289] had a right to enter as rated inhabitants as well as churchwardens, *and excluded them from it until two magistrates dispersed the rioters; that the other prosecutor, Hubback, having got into the vestry room and voted, wished to return home, but was prevented so doing, by the rioters having surrounded the door of the room, and was against his will compelled to remain in the room, until the rioters were dispersed by the magistrates.

Ingham and *Wightman* now showed cause. The prosecutors are entitled to costs. First, as churchwardens de facto, they are civil officers within the statute 5 & 6 W. & M. c. 11, s. 3. They had called a meeting of the inhabitants in vestry, and at the time of holding such vestry the defendants prevented three of the four prosecutors from going in. The prosecutors, therefore, *virtute officii*, were entitled to their costs in prosecuting the defendants. If a churchwarden de facto makes a rate for repairing a church, it will bind the parishioners. *Vin. Abr. Churchwardens*, (A 2), 12. Secondly, the prosecutors are parties grieved; because, as rated inhabitants, they had a right to be present at the vestry, where the rate was made, and the defendants obstructed them in the exercise of that right. An individual parishioner, if illegally obstructed in coming to the vestry, may maintain an action for the injury to his particular right. The statute 5 & 6 W. & M. c. 11, s. 3, ought to be liberally expounded. *The King v. Incedon*, 1 M. & S. 268.

Cresswell and *Alexander*, *contra*. Here the prosecutors were not churchwardens de facto, because they were chosen while other persons regularly appointed, filled the office. The defendants Thompkins and Lyall and two others *290] were appointed at Easter, and continued *till January, when these persons were appointed, who are neither churchwardens de facto nor de jure.

In order to constitute the prosecutors parties grieved within the meaning of the act of parliament, it is not sufficient that a public offence has been committed, but there must be some special and peculiar injury arising to the prosecutors from the riot besides that which affects all the king's subjects as well as them. *Rex v. Taunton St. Mary*, 3 M. & S. 465. The statute 5 & 6 W. & M. c. 11, s. 3, was intended either to protect public officers, or individuals prosecuting for injuries done to themselves: here all who attended the vestry, and all who might attempt or wish to do so, but were prevented by the conduct of the defendants, were aggrieved as well as the prosecutors.

LORD TENTERDEN, C. J. I think that, although the prosecutors were not properly civil officers, they were parties grieved within the meaning of the act of parliament. It appears that the parishioners being about to assemble peaceably in the vestry-room for the purpose of imposing a church-rate, the defendants and others committed the riot, and thereby impeded the business of the meeting; and that two of the prosecutors were violently pushed about by the rioters, who blocked up the entrance to the vestry-room, and thereby forcibly hindered them and a third prosecutor from entering the vestry-room, which they had a right to enter as rated inhabitants, and so kept them excluded until two magistrates dispersed the rioters; that the other prosecutor, Hubback, having got into *291] the vestry-room and voted, wished to return home, but was prevented *by the rioters having surrounded the door of the room, and was against his will compelled to remain in the room until the dispersion of the rioters. I think that the parties who suffered under this annoyance and obstruction, in going to and returning from the vestry, were parties grieved within the meaning of the act of parliament.

LITTLEDALE, J., concurred.

PARKE, J. If any persons were parties grieved by this riot, these prosecutors were so.

PATTESON, J. Those who went to attend the meeting at least were parties grieved by the riot.

Rule discharged

HEATH v. SANSOM and EVANS. April 27.

S. being indebted to a firm in which he was partner, gave a note in the name of another firm to which he also belonged, in discharge of his individual debt. The payees endorsed it over, and the endorsee sued the parties who appeared to be makers; Held, that this note was made in fraud of S.'s partner in the second firm, and could not be enforced against him by the payees, and that, at least under these circumstances of suspicion, the endorsee could not recover without proving that he took the note for value, though no notice had been given him to prove the consideration:

Held also, PARKE, J., dissentiente, that in all cases, where, from defect of consideration, the original payees cannot recover on the note or bill, the endorsee, to maintain an action against the maker or acceptor, must prove consideration given by himself or a prior endorsee, though he may have had no notice that such proof will be called for.

ASSUMPSIT by the plaintiff as endorsee against the defendants as makers of a promissory note. Plea, by the defendant Evans, the general issue. Sansom suffered judgment by default. At the trial before Lord Tenterden, C. J., at the sittings in Middlesex after Easter term 1830, the following facts appeared:— In July 1829, when the note in question was drawn, Sansom and Evans were, and had for a short time been, partners in some alum works at Bristol, which they carried on *under the style and firm of Philip Sansom & Co. [*292 During the same period, and for some years before, Sansom had been a partner in the Droitwich Patent Salt Company, a firm composed of several persons carrying on the salt trade at Bristol and other places. Sansom had been authorized to act and receive moneys on behalf of the company, as their agent; but in June 1829, and from that time forth, he was no longer permitted to do so. He was still a partner, however, when this action was brought. In July 1829, one of the auditors of the Droitwich Salt Company called upon Sansom for the sum of 300*l.* which he owed the firm, and he, to answer this demand, gave the note, on which the present action was brought, for 310*l.*, bearing date July 1, 1829, signed Philip Sansom & Co., payable to the Droitwich Patent Salt Company, or order, two months after date, value received, at the alum works, Bridewell Lane. This note the company endorsed to the plaintiff. The alum works were closed, and the partnership in them dissolved, in August 1829. It did not appear that anything had been due from this concern to the Droitwich Company, nor was it shown that the note had been endorsed for any valuable consideration: but no notice had been given to the plaintiff to prove the consideration for the endorsement. The Droitwich Company was solvent at the time when this action was brought. These facts were proved by the cross-examination of the plaintiff's witnesses. It was contended, on behalf of the defendant Evans, that this note, made in the names of Sansom & Co., appeared to have been given by Sansom for his own private debt; that this was a fraud within the cognisance of the Droitwich Company, inasmuch as the knowledge of Sansom, their partner, was their knowledge; and that, under these circumstances, the endorsee, not having *proved any valuable consideration given by him [*293 for the endorsement, had no right to recover. On the other side, it was contended, that in the absence of notice to prove the consideration, this defence was inadmissible. A verdict was found for the plaintiff, but leave given to move to enter a nonsuit; and a rule nisi having been obtained accordingly,

Sir James Scarlett and Hoggins now showed cause. Before the plaintiff was called upon to prove consideration, it was incumbent on the other party to make out some case of fraud or misconduct in obtaining the note, sufficient to require that answer. It is not to be presumed on the facts stated at the trial, that the note was not given for money really due from Philip Sansom & Co. to the Droitwich Company; on the contrary, it is consistent with the evidence that Sansom may have used the company's money in making payments at the alum works. And assuming that there was a debt between the Droitwich Company and Sansom and Co., the argument that Sansom's knowledge, as to the particular occasion on which the note was given, was the knowledge of the company,

becomes merely a technical objection, and ought not to prevail against the claim of the plaintiff, who must, *primâ facie*, be considered an endorsee for value. At any rate, where a defence is contemplated on the ground of fraud in obtaining the note, the plaintiff ought to have notice to prove the consideration. *Paterson v. Hardacre*, 4 Taunt. 114. [LITTLEDALE, J. That rule prevailed many years ago, but the practice is otherwise now.]

*294] *Bompas*, Serjt., and *Ball*, *contrâ*. Even if the practice were still as it is laid down in *Paterson v. Hardacre*, this is not a case where notice would be necessary; for the defect in the company's title on the note appears by the plaintiff's own evidence. It passed as undisputed at the trial that the note was given by Sansom for a debt of his own; and where a note is given, or bill accepted, by a partner under such circumstances, with the knowledge of the payee or drawer, such note or bill is fraudulent and void as against the other partner, *Wells v. Masterman*, 2 Esp. N. P. C. 731, *Shirreff v. Wilks*, 1 East, 48; the payee or drawer could not recover upon it, nor can an endorsee, without showing that he gave a valuable consideration. In *Duncan v. Scott*, 1 Campb. 100, where it appeared on the plaintiff's case that the bill on which the action was brought had been given under duress, Lord Ellenborough held that it lay on the plaintiff, who sued as endorsee, to give some proof of consideration; and, failing to do so, he was nonsuited. *Rees v. The Marquis of Headfort* (where the bill was obtained by fraud) was a similar decision, 2 Campb. 574. In *Grant v. Hawkes*, Chitty on Bills, 42, n. (1), 5th edit., Lord Ellenborough said, "An endorsee may recover on a bill against partners in a concern, though the drawing or accepting were contrary to agreement between them, and by one of the partners in fraud of the rest; *but then the endorsee must show that he gave value.*" In *Thomas v. Newton*, 2 Carr. & P. 606, Lord Tenterden says, "If the defendant shows that there was originally no consideration for the bill, that throws it on the plaintiff" (the endorsee) "to show that he gave value for it," or that value *295] was given by the *previous endorser. The same rule has prevailed in the case of bills which have been stolen or lost. In *Gill v. Cubitt*, 3 B. & C. 466, where a stolen bill had come to the hands of a broker, who discounted it and then sued the acceptor, it was held to be incumbent on the plaintiff to show, not only that he gave good consideration, but that he took the bill *bonâ fide*. In the present case, a suspicion is thrown upon the endorsee, not only by the original fraud in the making of the note, but also by the circumstance of his suing the makers rather than the endorsers, who were a well-known and solvent partnership.

LORD TENTERDEN, C. J. It is clear on the facts of the case, that this note was given in consideration of money due from Sansom alone to the Droitwich Salt Company, in which he himself was a partner; and we are all agreed that the company could not have maintained an action against Evans. This is an action by the company's endorsee, that party having elected to sue the makers of the note, instead of the Droitwich Company, from whom he received it, who are solvent, and of whom one at least, the endorser, must be known to the plaintiff. The question then is, whether, in order to succeed in this action against the defendant Evans, he was bound, under the circumstances of the case, to prove a consideration for the endorsement. According to the more recent practice, I think it was incumbent on him to do so: and this is a stronger case than the ordinary one, in which endorsees have been put to prove value given by reason of the circumstances under which an acceptance or note was obtained, *296] because here the *endorsee chooses to bring his action against makers, who are unknown to him, rather than sue the endorsers, whom he knows, and from whom he took the note. The rule for a new trial must be absolute.

LITTLEDALE, J. I am of opinion that the Droitwich Company could not have recovered on this note, and consequently that the present plaintiff cannot. It has been frequently held that where a note or acceptance of a bill has been obtained by fraud, loss out of the owner's hands, or duress, the endorsee is bound to show that he gave value, and in some instances even that he became

holder *bonâ fide*, and not under circumstances of suspicion. It may be laid down as a general rule, that if the note or acceptance were taken under such circumstances that the endorser himself could not recover, the endorsee must prove that he became so for a good consideration, though no notice be given him to produce such evidence. There is no more hardship in the necessity of proving consideration here than in ordinary actions on simple contract, where the plaintiff must be prepared to show a consideration if necessary, though in the great majority of instances no such necessity arises. It may be said that the rule now laid down is inconvenient, as restraining the negotiability of notes and bills; but this is fully counterbalanced by the inconvenience which would arise on the other hand, if a party who could not himself sue on a note or acceptance, could put it into the hands of a third person, and in consequence of such transfer, the proof of value given should be dispensed with. The present case is stronger than the ordinary one, of a bill accepted for accommodation, because here some little suspicion arises from *the note being endorsed over by the Droitwich Company, and the action then brought against the maker. I think, [*297 therefore, the rule ought to be absolute.

PARKE, J. I am of the same opinion on the special circumstances of this case; but I have always understood that an endorsement must be taken, *primâ facie*, to have been given for value, and that the proof, at least of circumstances tending to throw suspicion on such endorsement, lies on the party disputing its validity before the endorsee can be called upon to prove that he gave value for the bill. This doctrine appears to me to be correctly laid down by Eyre, C. J., in *Collins v. Martin*, 1 B. & P. 648. When the note or acceptance has been obtained by felony, by fraud, or by duress, it has been usual to require proof of valuable consideration on the part of the endorsee; and I do not dispute the propriety of that usage, as any one of those facts raises some suspicion of the title of the holder. But I am by no means satisfied that the same rule can be applied to *all* cases where an acceptance or note has been given without consideration. I think this is a very important question. It is difficult to reconcile the recent practice (for it is only recent) with principle; for the simple fact of want of consideration between the acceptor and drawer, or maker and payee, affords no inference that the holder received the bill or note *malâ fide*, or without consideration. It is, besides, a practice likely to produce great increase of expense, as, in every instance, a plaintiff, who is endorsee, can hardly be safe, without being prepared to prove, as to some one at least of the endorsements, that *value was given for it; and this inconvenience may outweigh that of cast- [*298 ing upon the defendant the burden of making out a case of suspicion against the endorsee before proof of consideration can be required from him. But it is sufficient for the decision of this case to say, that its circumstances were in themselves such as called upon the plaintiff to prove that value was given for the endorsement: for the Droitwich Company could not have sued the defendant Evans on this note; it must be taken to have been given to them by Sansom in fraud of Evans; and when we find the plaintiff suing him, instead of the Droitwich Company, who are solvent, it is impossible not to suspect that the note has been endorsed to the plaintiffs to enable them to sue Evans, and not *bonâ fide* for a valuable consideration. This creates a suspicion which the plaintiff ought to clear up; and on that ground I am of opinion that a nonsuit should be entered.

PATTESON, J. As at present advised, I think the general rule of practice on this subject has been correctly stated, and that where a note or acceptance has been given under such circumstances that the original payee could not recover on it, the endorsee may fairly be called upon to show how it came to his hands, and is not entitled to a previous notice. And, therefore, independently of the circumstances of suspicion in this case, I should think, upon the point of practice alone, this rule ought to be made absolute. Rule absolute.

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*The KING v. NEVILLE. April 28.

The statute 10 G. 2, c. 28, s. 4, imposes a penalty of 50*l.* for acting any entertainment of the stage without license; and it is by sect. 6 enacted, "that the penalty shall be recovered in a summary way before two justices, to be levied by distress and sale; and that for want of a sufficient distress, the offender shall be committed to prison for any time not exceeding six months, there to remain without bail or mainprize;" and then an appeal is given to the quarter sessions. A conviction by two justices, under this statute, having been affirmed on appeal, was, together with the order of sessions, removed into this Court by certiorari, and confirmed. A *levari facias* issued out of this Court for the penalty, and there was a return of *nulla bona*. This Court not having authority to exercise the discretion given by the statute to the justices, as to the term of imprisonment, granted a *procedendo* to carry back to the sessions the record of conviction, and the order of sessions, and commanding the justices to enter continuances upon the appeal from session to session, and proceed to award execution.

THE conviction in this case having been affirmed in Michaelmas term 1830 (1 B. & Adol. 489), a *levari facias* was issued to levy the sum of 50*l.*, and a return made in Hilary term, 1831, of *nulla bona*. In this term a rule nisi was obtained for a *ca. sa.* against the defendant, or for a *procedendo*, directed to the keepers of the peace and justices of the county of Lancaster, to carry back the record of conviction of the defendant in this prosecution, and the order of sessions affirming the same, and commanding the justices to enter continuances upon the appeal of the defendant against the record of conviction from session to session, and to proceed to award execution against the defendant thereon.

Courtenay now showed cause. There is no precedent for the issuing of a *ca. sa.* out of this court to enforce a conviction made by justices. The judgment of affirmance can only be enforced in this court by *levari* or *fieri facias*. *Rex v. Pullen*, 1 Salk. 369. In *Rex v. Rogers*, *Ibid.*, there is a dictum, that in default of goods a *ca. sa.* may issue; *but in *Rex v. Speed*, 1 Ld. Raymd. *300] 583, 12 Mod. 328, Holt, C. J., said, that if a conviction was affirmed in this Court, the Court might award a *levari facias*; but if the defendant had no goods, he made a question if they could imprison him. A *ca. sa.* is not in the nature of a commitment in execution of a penal judgment. The object is to enforce the payment of a debt. Here, if the defendant had not means to pay the penalty, it might operate as a perpetual imprisonment. But the stat. 10 G. 2, c. 28, only gives authority to the justices for want of a sufficient distress, to commit the offender to prison for any time not exceeding six months. The justices may, therefore, exercise a discretion as to the period of imprisonment, which this Court cannot. The party convicted ought not to be put in a worse situation by reason of the record having been removed into this Court than he would have been in in the court below, and that would be the case if a *ca. sa.* were to issue. Then, as to the *procedendo*, it is a general rule, that if a record be filed in the King's Bench upon a certiorari, it never can be sent back or remanded; per Holt, C. J. *Fazakerley v. Baldo*, 1 Salk. 352. *Tidd's Pr.* 410, 6th edition.

Starkie, contra. The record was removed by the defendant, and, therefore, he has no reason to complain of any inconvenience to which he may be consequently subjected. Where a conviction is removed into this court by certiorari, the Court has the same power of awarding execution which the Court below had, for otherwise there would be a failure of justice, as the Court below cannot *301] award execution, the record being *here; and since this Court has a power to confirm as well as to revise or quash, it follows by necessary consequence that they have a power to award execution of what they confirm. *Rex v. Speed*, 12 Mod. 328. They therefore had power to levy the penalty by *levari facias*, and they would undoubtedly have had the power of imprisoning the defendant, if the period of his imprisonment had been fixed absolutely by the statute. But it enables the justices to exercise a discretion upon that subject. Assuming that this Court has not authority to exercise the same discretion, or that, not having the facts before them, they have not the means of doing so, they will, at all events, in order to prevent a failure of justice, send the record back

to the sessions, in order that the conviction may be enforced, as it would have been if it had never been removed.

LORD TENTERDEN, C. J. I think we ought to make the rule absolute for a procedendo. It is undoubtedly a general rule, that if a record be filed in this court upon a certiorari it cannot be sent back or remanded; but the rule applies to cases where this court has the power to execute the judgment of the inferior court. Here we have not the power (which the convicting justices have), in case there be not a sufficient distress, of exercising a discretion as to the term of imprisonment; so that, in the event that has happened, this Court cannot enforce the execution of the judgment. In order to prevent a failure of justice, therefore, I think we ought to send the record back to the sessions, in order that that court may cause it to be enforced, as they would have done if it had never been removed.

*LITTLEDALE, J. I think that a ca. sa. ought not to issue. The power of imprisonment is given to the justices only, and they are to exercise a discretion as to the term of imprisonment. That discretion this Court has no power to exercise. It is a technical rule, undoubtedly, that if a record removed by certiorari be once filed in this Court, it shall not be sent back; but that rule is not inflexible. In *Rex v. Kenworthy*, 1 B. & C. 711, the defendant had been convicted of perjury at the Chester assizes, and an entry was made upon the record, that it was ordered the said L. K., the defendant, be transported for the term of seven years; and this Court held, that the entry was merely an order, not a judgment, and to prevent a failure of justice, awarded a procedendo to the Court below to proceed to give judgment. On the same principle the Court ought, in this case, to grant a procedendo to enable the justices below to award execution; for there will be a failure of justice if the record be not sent back to the sessions. [*302]

TAUNTON, J. I think it quite clear that a ca. sa. cannot issue. The statute directs that the penalty shall be levied by distress and sale of the offender's goods, and for want of a sufficient distress, that the offender shall be committed to the house of correction for any time not exceeding six months. It seems to me, this Court does not possess the authority which the convicting justices do of committing the party to prison for a period not to exceed six months. In the event, therefore, which has happened, it has no means of enforcing the performance of the judgment. The record ought to be sent back to the justices, in order to enable them to enforce the conviction by the same means which they would have had if the record had never been removed. [*303]

PATTESON, J. It is impossible for this Court to give effect to the judgment of the court of quarter sessions, and, therefore, to prevent a failure of justice, the record must be sent back to the sessions. The rule for a procedendo must be made absolute. Rule absolute.

ROBSON and SHARPE v. DRUMMOND. May 2.

A., a coachmaker, entered into an agreement to furnish B. with a carriage, for the term of five years, at seventy-five guineas a year. At the time of making the contract, C. was a partner with A., but this was unknown to B., the business being carried on in the name of A. only. Before the expiration of the first three years the partnership between A. and C. was dissolved, A. having assigned all his interest in the business, and in the contract in question, to C., and the business was afterwards carried on by C. alone. B. was informed by C. that the partnership was dissolved, and that he (C.) had become the purchaser of the carriage then in his, B.'s, service. The latter answered that he would not continue the contract with C., and that he would return the carriage to him at the end of the then current year, and he did so return it. An action having been brought in the names of A. and C., against B., for the two payments which, according to the term of the contract, would become due during the last two years of its continuance, it was held, that the action was not maintainable, the contract being personal, and A. having transferred his interest to C., and having become incapable of performing his part of the agreement.

THIS was an action brought by the two plaintiffs against the defendant for breach of an agreement, whereby the plaintiff Sharpe, on the 2d of February, 1824, agreed to furnish the defendant with a new chariot, from that day, for the term of five years thence next ensuing, at the yearly payment of seventy-five guineas per annum, each yearly payment to be paid in advance. Sharpe was to *304] keep the chariot in all necessary repair, *violence excepted, to supply the same with new wheels when required, and to new paint it once in the said term; and at the expiration of the term, defendant was to cause the chariot to be delivered to Sharpe, with all its appointments, in good condition, fair wear and tear excepted. At the trial before Lord Tenterden, C. J., at the Middlesex sittings after Michaelmas term 1830, it appeared that Sharpe, one of the two plaintiffs, in February, 1824, and for several years preceding, carried on business as a coachmaker in South Street, Grosvenor Square, and that at the time of the contract, Robson, the other plaintiff, was a secret partner with Sharpe, but that was not known to the defendant, the business being carried on in the name of Sharpe only. A chariot was built according to the terms of the contract and delivered to the defendant, and he kept it from February, 1824, to the 1st of February, 1827. The business was carried on in the separate name of Sharpe till June 1826, when he retired from the business, and Robson continued to carry it on. On the 30th of June, 1826, Robson addressed the following letter to the defendant:—"Sir, I beg leave respectfully to inform you, that the partnership between Mr. Sharpe and myself, as coachmakers, carried on under the name of Sharpe, only, at No. 19 South Street, is now dissolved, and the whole of the partnership property having been sold by public auction on the 28th and 29th instant under an order of the Court of Chancery, I have become the purchaser of the chariot now in your service, pursuant to contract, and will do myself the honour of waiting on you without delay, to receive your commands relative thereto, and also to give any explanation you may require. I beg at the same time to inform *305] you, *that the business will in future be carried on by me as usual on the same premises." The defendant, in answer, informed Robson that the agreement for the hire of the carriage had been entered into with Sharpe only; and that, as he (defendant) did not choose to continue the job with any other person, the carriage would be returned on the 2d of February, 1827, the end of the then current year. On the 21st of December, 1826, the plaintiff Sharpe was told by the defendant that he was ready to continue the job with him according to the contract to its termination, or would return the chariot to him at the end of the then current year; Sharpe said he could not continue the contract, for that he had no longer anything to do with it, as all the partnership property belonging to him and Robson had been sold by auction; that the agreement and the chariot jobbed by the defendant had been purchased by Robson, and that if the defendant decided upon returning the chariot at the end of the current year he must send it to Robson, for that he (Sharpe) could not take it in. On the 1st of February, 1827, the chariot was taken to Robson's place of business and left there. The action was brought to recover the price stipulated to be paid for the use of the carriage from that time to February 1829. Lord Tenterden was of opinion that the action was not maintainable, and directed a nonsuit, but reserved liberty to the plaintiff to move to enter a verdict for 157*l.* 10*s.* A rule nisi having been obtained for that purpose,

Campbell and *White* now showed cause. The two plaintiffs cannot sue jointly on this contract. In *Lucas v. De la Cour*, 1 M. & S. 249, a contract was made *306] by one of several partners in his individual capacity, he declaring at the *time that the subject-matter of the contract was his property alone: and it was held that his declaration was evidence of that fact against all the partners, and, therefore, that they could not sue jointly upon such a contract. Now in this case Sharpe made the contract with the defendant, and the latter did not know Robson to be a partner; he was in fact a mere dormant partner, and a dormant partner cannot maintain an action upon a contract to which he is not a party, *Lloyd v. Archbowle*, 2 Taun. 324, *Mawman v. Gillett*, 2 Taun. 325, n. (a).

But assuming that the two might sustain an action on a contract made by one for the benefit of the firm, it is an answer to this action that one of the two partners in whom the defendant may have reposed a special confidence retired from the firm and became incapable of performing his part of the contract. By the dissolution of the partnership, and Sharpe's leaving the firm, the contract entered into by the latter with the defendant was determined; he had no authority from the defendant to make another contract on his behalf with Robson, and the defendant himself, when applied to for that purpose, refused to have anything to do with him.

Hutchinson, contrd. Sharpe, by his contract, continued liable to Drummond for five years. Nothing which took place between Sharpe and Robson could alter the relative situation of Sharpe and Drummond, or discharge either from his liability on the contract. But Sharpe having contracted on behalf of himself and his partner, an action for the breach of such contract may be maintained in the name of the two. In *Lucas v. De la Cour*, the contract was made by one partner in respect of property which belonged to him alone. Here [*307] *the subject-matter of the contract belonged to the firm. The defendant, if he be discharged from his obligation to perform the contract during the last two years, by reason of Sharpe's having quitted the firm, will have an undue advantage; for he will then have had the carriage during the first three years, when it was in good condition, and will not be bound to keep it during the last two, when it must be worse for wear.

LORD TENTERDEN, C. J. It is unnecessary to decide whether if Sharpe had continued in the partnership till the expiration of the five years during which the contract made by him was to continue in force, the action in the joint names of him and his partner might not have been maintained. Here, after the partnership between Robson and Sharpe had ceased to exist, and after Sharpe had ceased to carry on the business of a coachmaker, the defendant offered to continue the job with Sharpe, but he replied that that was impossible. Now the defendant may have been induced to enter into this contract by reason of the personal confidence which he reposed in Sharpe, and therefore have agreed to pay money in advance. The latter, therefore, having said it was impossible for him to perform the contract, the defendant had a right to object to its being performed by any other person, and to say that he contracted with Sharpe alone, and not with any other person. On that ground I think the nonsuit was right. The rule for setting it aside must therefore be discharged.

LITTLEDALE, J. The nonsuit was right. I am disposed to think there was no objection to Robson and Sharpe suing on a contract made by Sharpe only on behalf of himself and his partner; but, as to the other *point, I think [*308] this contract was personal, and that Sharpe having gone out of the business, it was competent to the defendant to consider the agreement at an end. He may have been induced to enter into the contract by reason of the confidence he reposed in Sharpe; and at all events had a right to his services in the execution of it.

PARKE, J. This appears to me to be a very clear case. The defendant made his contract with Sharpe by name, and not knowing that any other person had an interest in the subject-matter; and although Robson had an interest in it so to entitle him to sue jointly with Sharpe, the defendant has the same rights against Sharpe and his partner, and may make the same defence to this action brought by them as if he had contracted with Sharpe alone, and the action had been brought by him. The contract was to continue for five years. At the end of the third year there was a dissolution of partnership between Sharpe and Robson, and notice of that dissolution, and of Sharpe having assigned all his interest in the contract to Robson, was given to the defendant, who said he would not continue the contract with Robson. The very fact of Sharpe's having transferred his interest in the contract to Robson (a mere stranger as far as the defendant was concerned), was equivalent to saying (that which he did afterwards say), I will not perform my part of the contract; and that is an answer to the

present action brought in the names of Sharpe and Robson; for the defendant had a right to have the benefit of the judgment and taste of Sharpe to the end of the contract, and which, in effect, he has declined to supply. It is true that the defendant will have an advantage which he would not *have had if *309] the contract had continued for the whole five years; for he will have had the use of the carriage during the first three, and will not be bound to keep it during the last two, when it must be worse for wear; but this arises from the default of one of the plaintiffs in not performing his part of the contract.

PATTERSON, J. This case appears to me to admit of no doubt. It is, in substance, a case where a person having made a contract in his own name attempts to back out of it, and transfer it to a third person. That he had no right to do. The rule for setting aside the nonsuit must be discharged.

Rule discharged.

OXENHAM, Gent., one, &c., v. FRANCES MARY CLAPP, Executrix
of the last Will and Testament of FRANCIS HUNT CLAPP,
deceased. May 3.

An executor de son tort may, after action brought by a simple contract creditor, pay a specialty debt, and plead the payment of that debt in bar of action.

DECLARATION by an attorney, for work and labour, against the defendant, as the executrix of Francis Hunt Clapp. There were counts on promises by the deceased testator, and by the defendant as executrix. Plea, an outstanding bond, dated the 10th of March, 1793, conditioned for the payment of 600*l.* by G. Clapp and Francis Hunt Clapp to one Locke; that Locke died; that one Mary Blake, the wife of Malachi Blake, was his executrix, and that the bond was unpaid at the death of Francis Hunt Clapp; that after the exhibiting of the plaintiff's bill, and whilst the defendant had leave to imparle to the same, to *310] *wit, on 27th of December, 1824, the defendant paid the amount of the bond to Malachi Blake and Mary his wife; and that the defendant had fully administered all the goods and chattels of Francis Hunt Clapp, except goods to the value of 270*l.*, which were not sufficient to satisfy the sum of 600*l.* Replication, that the defendant was never executrix of the will of Francis Hunt Clapp, except of her own wrong, and that at the time of exhibiting the bill of the plaintiff, she, the defendant, as such executrix of her own wrong, had never been called upon to pay, nor had she as such executrix of her own wrong at any time been called upon to pay or paid the said sum of 600*l.* supposed to be so due by virtue of the bond; and that she, the defendant, as such executrix of her own wrong at the time of the exhibiting the bill, had divers goods and chattels which were of Francis Hunt Clapp deceased at the time of his death, in the hands of her the defendant as such executrix as aforesaid, to be administered. Rejoinder, that after the exhibiting of the bill of the plaintiff, and whilst the defendant had leave to imparle to the same, and while the said principal sum of 600*l.* was wholly due and unpaid, to wit, on the 27th of December, 1824, she, the defendant, paid the said principal sum of 600*l.* to Malachi Blake and Mary his wife, as such executrix of the will of Locke as aforesaid. To this rejoinder there was a general demurrer and joinder.

Campbell in support of the demurrer. The question in this case is, whether an executrix de son tort has a right to pay a specialty creditor before any demand made, in preference to, and pending an action brought by a simple contract creditor, and to retain assets to *the amount so paid. An executor de son *311] tort can derive no advantage from his own wrongful act. He cannot retain for his own debt, Coulter's case, 5 Co. 30, Padget v. Priest, 2 T. R. 97, even though he obtain the assent of the rightful administrator after administration granted, and though his debt may have been of a superior degree, Curtis v. Vernon, 3 T. R. 587. In the last-mentioned case all the authorities are

collected; and there it was also decided that such an executor cannot discharge himself from an action brought by a creditor, by delivering over the effects to the rightful administrator, after the action is brought, though undoubtedly he might do so previously to the commencement of the action. That case is an authority to show, that if a wrongful executor be liable at the time when an action is brought against him by a creditor, he cannot, by any subsequent act, discharge himself from that liability. If the defence set up by this plea were available, many frauds might be committed against creditors. An executor de son tort might buy a specialty debt, and, when sued, say, that it was paid in a course of administration. All the protection given to a wrongful executor, is that he is not to be compelled to pay a debt twice over. [Lord TENTERDEN, C. J. Suppose in this case the payment was made in consequence of notice from the bond creditor.] The replication alleges that the defendant never was called upon to pay, or paid. The rejoinder only avers that she has paid. If the defendant has now to pay the debt twice, it is her own fault, because, if she had confessed judgment for the plaintiff's demand it would have been a defence to an action by the bond creditor; and if she had paid the bond creditor *before* [*312] action brought, it would have been a defence to this action. [PARKE, J. Suppose, on these facts, the defendant had not paid the outstanding bond debt and pleaded the payment (as she has now done), and the present plaintiff had in consequence recovered, would not the obligee have been entitled to sue her? Is there any authority for saying that an executor must have formal notice of a debt of higher degree, in order to be precluded from paying the inferior debt first? PATTESON, J. It is laid down in Toller (Law of Executors, p. 292), that if he be by any means apprised of the superior debt, he cannot pay the inferior.] It must be conceded that, if the payment had been made before action brought, it would have been a payment in due course of law; but an executrix de son tort cannot, by any act done after action brought, relieve herself from a liability which once has attached.

Manning, contra, was stopped by the Court.

Lord TENTERDEN, C. J. There must be judgment for the defendant. This case is distinguishable from those cited, because here the defendant does not seek to take advantage of her own wrongful act. The cases cited show that an executor de son tort cannot avail himself of his own wrongful act in taking possession of the goods of the deceased in order to retain a debt for his *own benefit*; and on that ground the retainer set up in those cases was not allowed. But here the defendant pleaded, in answer to the plaintiff's claim, that *after* action brought she had disposed of the assets of the deceased in that course of administration which the law allows; viz., by discharging a debt of higher [*313] degree. And if at any time before plea pleaded an executor comes to the knowledge of such a debt, he is bound to pay it before a simple contract debt, whether he be a rightful or wrongful executor. I am not prepared to say that if it had been alleged that the payment had been voluntary, the defendant could have justified paying a debt of equal degree with that of the plaintiff; because that might have been taking an undue advantage of her own wrong. It is sufficient in this case that the debt paid was a specialty debt, and that that sued for by the plaintiff was one by simple contract. And in many cases it may be very convenient, and even necessary, that an executor de son tort should dispose of the assets of the deceased in due course of administration.

LITTLEDALE, J. I am of the same opinion. An executor de son tort, undoubtedly, cannot retain for his *own* debt, and the reason for that is assigned in Coulter's case, 5 Coke, 31, "for from thence would ensue great inconvenience and confusion; for every creditor (and chiefly when the goods of the deceased are not sufficient to satisfy all the creditors) would contend to make himself executor of his own wrong, to the intent to satisfy himself by retainer, by which others would be barred. And it is not reasonable that one should take advantage of his own wrong; and if the law should give him such a power, the law would be the cause and occasion of wrong, and of the wrongful taking of

*314] the goods of the deceased." But it is there also said, "that all lawful acts which an executor of his own wrong doth, are good." Now, by law, it is incumbent upon an executor to make payment of the debts of the deceased in a certain order, viz. to pay debts by specialty before those by simple contract. The payment of the bond debt in this case, therefore, was a lawful act. It appears to me to make no difference, whether the payment was made before or after action brought by the simple contract creditor. An executor under a plea of plene administravit may give in evidence, that before action brought he has exhausted the assets by payment of debts of the deceased not inferior to that of the plaintiff; but he must plead specially payment after action brought. Here the defendant has pleaded it specially, and it was a payment in due course of law.

PARKE, J. I am of the same opinion. The principle is, that an executor *de son tort* cannot by his own wrongful act acquire any benefit; for if he could, there would be a struggle among the creditors, and each would contend to make himself executor in order to have the right to retain, which would produce great strife and confusion. He cannot, therefore, retain for his own debt in preference to that of another creditor. But he is protected in all acts not for his own benefit, which a rightful executor may do. Here between the time of the action brought and plea pleaded the defendant had notice of an outstanding bond, which in the due course of the administration of the assets of the deceased ought to be paid in preference to a debt by simple contract; and he made such payment: that was a lawful act, and as to that payment, he is protected. It is true that an executor *de son tort* cannot discharge himself from *the debt

*315] of a creditor by delivering over to the rightful executor the assets, after action brought, because the creditor would thereby be in a worse situation; he would have to bring a second action against the rightful executor. But this is not such a case. Here the defendant has paid a bond debt in the due course of administration, and the creditor, therefore, could not afterwards maintain any action in respect of that debt against the rightful executor.

PATTERSON, J. A wrongful and a rightful executor only differ in this respect, that the first is to take no benefit by his own wrongful act; as regards other creditors, there is no difference; an executor *de son tort*, as well as a rightful executor, may administer the assets in due course of law, and may, therefore, justify the payment of a bond debt, of which he has notice, before a simple contract debt.

Judgment for the defendant.

WALFORD et Ux. v. JOHN MARCHANT. May 3.

By the annuity act 53 G. 3, c. 141, s. 10, no enrolment is necessary where the annuity is charged on freehold or copyhold lands equal to it in value, over and above any other annuity charged or secured on such lands. Such "other annuity," to be within the meaning of the act, must be directly and specifically charged on the lands, not merely secured in a manner which may by possibility affect them, as by judgment entered up on a warrant of attorney.

DEBT on an annuity deed. Pleas, *non est factum* (on which issue was joined), and that no proper memorial had been enrolled. Replication to the latter plea, that the annuity was issuing and payable out of, and charged upon, certain parts and shares of freehold lands in Great Britain, to wit, three sixth parts of

*316] certain houses in the indenture described, the said three sixth parts at the time of granting the annuity, and still, being of equal annual value with the said annuity, over and above any other annuity, and the interest of any principal sum or sums then charged or secured thereon, of which the said Mary had notice at the time of the grant of the said annuity: and that the grantors, at the time of the granting of the said annuity, were enabled to charge the fee simple of the said three sixth parts of the said freehold lands in possession. Rejoinder, that the said three sixth parts

were not at the time of granting the annuity, of equal annual value with the said annuity, over and above, &c., as in the replication alleged. Upon this issue was joined. At the trial before Lord Tenterden, C. J., at the sittings at Guildhall after Michaelmas term 1829, a verdict was found for the plaintiffs for 120%, the arrears of annuity due, subject to the opinion of this Court upon the following case:—

The houses charged with the above annuity were worth 50%. per annum, and had been devised to certain persons in trust for Rose Hood Marchant (the defendant's mother) during her life, and afterwards for her children, to be equally divided among them, share and share alike as tenants in common, and for their heirs and assigns for ever. No other freehold property was devised. The annuity (48%. per annum) was granted in 1822 to Mary Walford, then Mary Dutton, by the said Rose Hood Marchant, and by the defendant and two of his brothers according to their respective shares of the freehold in reversion, for fifty years. In 1821, Henry Merchant, one of the grantors, and certain other persons, had, by their bond duly enrolled, become bound to one William *Blessed in the sum of 1000%, conditioned for the payment to him by [317 Henry Merchant of an annuity of 45%. per annum, and had at the same time given a warrant of attorney to confess judgment for the same sum of 1000%, as a collateral security for the payment of the last-mentioned annuity during the term of ninety-nine years, if W. B. and two other persons named should so long live. Execution might be sued out upon the judgment so to be confessed, for any portion of the annuity which might be in arrear thirty days after the proper time of payment and twenty-one days after notice. The judgment was afterwards entered up and docketed; and Mary Dutton had notice of this prior annuity, and of the judgment, when the annuity of 48%. was granted to her. The question for the opinion of the Court was, Whether this annuity of 1821, and the judgment given to secure it, were a charge upon the houses in question within the meaning of the act 53 G. 3, c. 141, s. 10.(a) If they were so considered, the shares of houses charged with the annuity in respect of which this action was brought would not be "of equal or greater value than *the said annuity, over and [318 above any other annuity charged or secured" on the said houses, and the defendant would be entitled to a verdict: otherwise the verdict for the plaintiffs was to stand.

Dodd for the plaintiffs. The annuity of 1821 is not charged and secured upon the lands within the meaning of the statute. Throughout the clause in question the annuities referred to are evidently such as are charged by the grant on specific lands, not annuities which may be satisfied out of them by means of judgments. For if this latter meaning be given to the words "any other annuity charged and secured thereon," then the words "secured upon freehold or copyhold lands," &c., "of equal or greater annual value," in the earlier part of the clause, must be interpreted with the same latitude, and no annuity will be within the act, if there be any lands (sufficiently unincumbered) which can be affected by a judgment for the arrears. There is no express decision on the point; but in *Halsey v. Hales*, 7 T. R. 194, and *Amburst v. Skinner*, 12 East, 263, the Court appears to contemplate this clause merely as applying to actual and direct charges. An annuity secured on land, according to the terms of this section, ought to be so by remedies available immediately against the land, as by a power of distress. A judgment, to affect the land, must be enforced by

(a) Which provides, that the act shall not extend to any annuity or rent-charge given by will or by marriage settlement, or for the advancement of a child; nor to any annuity or rent-charge secured upon freehold or copyhold or customary lands in Great Britain or Ireland, or in any of his majesty's possessions beyond the seas, of equal or greater annual value than the said annuity, over and above any other annuity, and the interest of any principal sum charged or secured thereon, of which the grantee had notice at the time of the grant, whereof the grantor is seised in fee simple or fee tail in possession, or the fee simple whereof in possession the grantor is enabled to charge at the time of the grant, or secured by the actual transfer of stock in any of the public funds, the dividends whereof are of equal or greater annual value than the said annuity; nor to any voluntary annuity or rent-charge granted without regard to pecuniary consideration or money's worth; nor to any annuity or rent-charge granted by any body corporate or under any authority or trust created by act of parliament.

elegit, and that will only operate upon one half, and not upon any part unless the goods be insufficient. And on elegit the sheriff does not give actual possession; that must be obtained by ejectment. A judgment gives no specific *319] lien upon any definite property. In *Brace v. The Duchess of Marlborough*, 2 P. Wms. 491, it was held, that where there are two mortgages, and a judgment creditor buys in the first, he cannot tack this to his judgment, though a third mortgagee might to his mortgage; "for one cannot call a judgment creditor a purchaser, nor has such creditor any right to the land; he has neither *jus in re* nor *ad rem*, and therefore, though he releases all his right to the land, he may extend it afterwards. All that he has by the judgment is a lien upon the land, but non constat whether he will ever make use thereof." The same view is taken of the situation of a judgment creditor in *Finch v. The Earl of Winchelsea*, 1 P. Wms. 277, where it is said that a judgment is only a general security, not a specific lien upon the land. The Court here called upon

Comyn for the defendant. The statute ought to be construed strictly with reference to the object, which was, that all annuities should be enrolled, unless under very peculiar circumstances, which are pointed out in the tenth section. To excuse the want of a memorial the case ought to be brought distinctly within the exemptions there given. Here the grantee, at the time of the grant, had notice of another annuity which did, substantially, affect the land, and she ought, therefore, according to the true intention of the act, to have procured an enrolment, although the prior annuity was not charged specifically on the land, out of which the subsequent one was to issue.

*320] *LORD TENTERDEN, C. J. The terms of the act are very plain: they require that the annuity to be exempted from enrolment shall be charged on lands of equal or greater annual value over and above any other annuity charged or secured thereon. That must mean a charge operating directly on the land. No man can say that this judgment is such a charge.

LITLEDALE, J., concurred.

PARKE, J. The statute contemplates a direct charge upon the land; not one like this, which may be satisfied by other means.

PATTESON, J., concurred.

Judgment for the plaintiffs.

STEPHENS v. WILKINSON and Another. May 4.

In an action by the payee against the acceptor of a bill of exchange drawn for the balance of purchase-money of articles bought at a sale, it is no defence that two months after delivery of the goods to the vendee, the vendor forcibly retook possession of them; for the vendee cannot treat that act as a rescinding of the contract, but must bring trespass.

THIS was an action by plaintiff as payee, against the defendants as acceptors of the following bill of exchange:—

"30th of October, 1826.

"Two months after date, pay to Mr. Henry Fowel Stephens, seven hundred forty-one pounds 3s., for balance of purchase-money of articles bought by me at the sale of the materials of the St. Agnes Consolidated Mines.

"JAMES PROUT."

*321] *At the trial before Littledale, J., at the London sitting after Trinity term 1830, it appeared, that in September 1826, the steam-engine, utensils, effects, and furniture of the St. Agnes Consolidated Mines in Cornwall, were sold by auction by the plaintiff, who was an auctioneer and also captain of the mines. Prout the drawer attended the sale (on behalf of a Mr. Fleeming), and purchased to the amount of 1541*l.* 3s. Fleeming subsequently paid 800*l.* in part, and gave the above bill for the remainder. The plaintiff acted throughout under the directions of J. L. Jones, who was the deputy purser of the mines; and the

keys of the premises, where the greater part of the effects and furniture were, were delivered to Prout, Fleeming's agent. Fleeming and J. Jones (father of J. L. Jones) had at one time been owners of the mines, and Fleeming had laid out a large sum in purchasing materials for them, and afterwards agreed to sell his interest to J. L. Jones; but the purchase-money was never paid. Before the bill became due Fleeming gave notice to the plaintiff that it would not be paid; and the defendants, who accepted for his accommodation, accordingly dishonoured it when due. The plaintiff and J. L. Jones forcibly took possession of the utensils, and put padlocks on the doors of the premises where the greater part of the effects and furniture were. But it did not distinctly appear upon the evidence whether such seizure took place before or after the bill was dishonoured. It was contended on the part of the defendants, that there was no consideration for the bill; first, because the goods were Fleeming's before the sale; secondly, because the defendants were entitled to treat the seizure of the goods by the plaintiff as a *total rescinding of the contract. As to the first point, the learned Judge was of opinion that Fleeming, having, by [*322 his agent, bought these goods from other persons, and paid for them in part, was estopped from saying, in answer to an action for the remainder, that they were his own goods; and, as to the second point, he inclined to think that the seizure of the goods by the plaintiff did not destroy the consideration for the bill if it took place after it was dishonoured; and he told them to find for the plaintiff if they thought the goods were retaken after the bill was dishonoured,—otherwise, for the defendants. The jury having found for the defendants, a rule nisi was obtained for a new trial in Michaelmas term 1830; against which,

Campbell and Maule now showed cause. The plaintiff, for the purposes of this action, may be considered the seller of the goods, and the defendants the purchasers. The seller who, having delivered goods in pursuance of the contract, afterwards takes possession of them, is estopped from saying that the contract of sale is still subsisting. It would be an answer to an action brought to recover 74*l.* 3*s.*, the balance unpaid for the goods, to show that the seller after the sale took back the goods (including those which were actually paid for); because the vendee may, at his election, treat the subsequent seizure of the goods by the vendor as a dissolution of the contract. [PARKE, J. A purchaser who is in a state of insolvency may, at any time before the goods come into his actual possession, rescind the contract with consent of the seller; but when the goods have been actually received into the possession of *the purchaser, he [*323 cannot rescind the contract, and by returning them to the seller prevent their being applied to the satisfaction of his debts. The seizure of the goods here will not be a defence to the action, unless it amount to an actual dissolution of the contract.] The purchaser has derived no benefit whatever from the contract, though the goods were delivered to Prout on his behalf. [PARKE, J. Fleeming got all he bargained for: the goods were delivered to his agent.] If a horse be delivered to a purchaser one moment and taken away the next, surely the seller could not, in an action for goods sold and delivered, recover the price. The stopping of goods in transitu is a rescinding of the contract of sale. [PARKE, J. That point was raised in argument in *Clay v. Harrison*, 10 B. & C. 99, but not decided.] Fleeming is in the same situation, in fact, as if the goods never had been delivered to him; he has derived no benefit whatever from the contract

Follett and Cowling, contra. The contract of sale was never rescinded. It was not competent to the vendor, without the consent of the vendee, to dissolve the contract; and if that be so, the retaking possession of the goods sold by the vendor, after they had been once delivered to the vendee, is no answer to the action. The vendee is in precisely the same situation as if they had been taken away from him by a third person. His remedy, therefore, must be by bringing an action of trespass. The case of stoppage in transitu has no analogy to the present case; for, here, the goods had once vested in the vendee by delivery to his agent, and they remained in his *possession for a considerable time. But it has been held, even if the seller stop goods in transitu to prevent [*324

their getting into the hands of an insolvent broker, he does not thereby rescind the contract of sale; and if he afterwards offer to deliver the goods to the buyer, on payment of the price according to agreement, he may maintain an action against the buyer for the price. *Kymer v. Suwercropp*, 1 Campb. 109.

LORD TENTERDEN, C. J. I think that the rule should be made absolute for a new trial. This is an action against the acceptor of a bill of exchange. The acceptance having been proved, it was incumbent on him to make out clearly a defence against the plaintiff's claim on the bill. In the first place, the facts appear to me to be involved in so much obscurity, that I, individually, have very great difficulty in getting at the real truth and substance of them; but, taking them most favourably to the defendants, the case stands thus:—The person who bought the goods paid part of the purchase-money, and gave this bill for the residue; had possession of the goods delivered to him; kept them for two months, and was then dispossessed by the vendor; and it is said that entitles the defendants to refuse to pay the bill. I am, however, inclined to think that in point of law that is not so, but that the vendee's remedy is by an action of trespass. In that action he will be entitled to recover a full compensation for the injury which he sustained by the wrongful seizure of the goods, and their value will be the *325] measure of damages. A successful *resistance to this action will not amount to a perfect remedy. It has been said that the vendee was at liberty to treat the subsequent seizure of the goods as a rescinding of the contract ab initio, and therefore that there was a total failure of consideration for the bill. If that be so, not only may the present action be successfully resisted, but the vendee may also maintain an action against the vendor to recover back the residue of the price actually paid. I think, however, he cannot maintain any such action, inasmuch as he had the possession and enjoyment of the goods for a considerable time. It follows that there was not a total failure of consideration for the bill, and, therefore, that the present verdict ought not to stand.

LITLEDALE, J. I think, under all the circumstances of the case, it should go to a new trial.

PARKE, J. I also think in this case there should be a new trial. The action is brought by Stephens the auctioneer, who sold certain goods to Mr. Fleeming. He paid for them partly by 800*l.* in cash, and partly by giving this bill, accepted by the defendants on his behalf, to Stephens. The defendants having accepted for Fleeming, the case may be considered the same as if Fleeming the purchaser was the defendant; and the question is, whether Stephens can maintain an action on this bill? The first defence was, that these goods were in reality Fleeming's, which he had bought. That defence was disposed of on the trial. My brother *326] Littledale held that Fleeming, having bought these goods *as goods of other persons, and having paid for them partly by the 800*l.* and partly by the bill, could not afterwards say they were his own goods; and in that I perfectly concur. The next ground of defence was, that there was a total failure of consideration for the bill; and if that had been proved, certainly it would amount to a defence. I am clearly of opinion that there was not a total failure of consideration. The consideration for the bill was the sale and delivery of the goods, and Fleeming, the real defendant, had all the consideration which he bargained for; for he (by his agent) received the goods, the subject of the sale, and had them in his possession for two months. But it is said there was a total failure of consideration, because they were afterwards taken possession of by the vendor, and that the vendee may treat that act as a dissolution of the contract. Now, assuming that all the goods were taken possession of by the vendor (which does not distinctly appear), to constitute want of consideration a defence to a bill of exchange, there must be such a total failure as would have enabled the vendee to recover back the whole money, if money had been paid instead of the bill. Total failure of consideration is where the party has been deprived entirely of all benefit of the thing for which the bill was given; and there he might recover back the money paid, if there had been a money payment. That is not

the case here, unless the contract has been dissolved. It could be dissolved by mutual consent only. No case has been cited, and no dictum, which confirms the position that the retaking of the goods by the vendor may be treated by the vendee as a dissolution of the contract. If the goods are delivered by the vendor, and taken *possession of by the vendee, his title to them is complete; [327 the consideration for the price is then perfect. If they are afterwards forcibly retaken by the vendor, the vendee may maintain trespass, and the measure of the damages would be the value of the goods at the time of the retaking; whereas if he may treat the retaking of the goods as a rescinding of the contract, it follows, as a consequence, that he would be entitled to recover the whole purchase-money, or the value of the goods (as agreed upon) at the time of the sale, notwithstanding he may have had the use of them in the interval between the sale and the retaking, and though they may be actually deteriorated in value as they would be if they were of a perishable nature. In point of law, the situation of the parties is this: the vendee has had all he was entitled to by the contract of sale; and he must therefore pay the price of the goods. He may bring trespass against the vendors for taking possession of them again, and may recover the actual value of the goods at the time they were taken.

PATTON, J. I am of opinion in this case that the rule must be made absolute. The first objection has been disposed of. As to the second, namely, that there was a failure of consideration, it is only necessary to inquire what was the consideration to see that there is no such failure. The consideration was the sale and delivery of the goods; as soon as they were delivered the consideration was complete and executed. Besides, here the goods remained in the possession of the vendee for two months; during which time he might have had the beneficial use of them. If, after that period, the *parties had, in express terms, [328 agreed to rescind the contract, they might so have done; but there was no evidence of such an agreement, nor was the case put on that ground; but it was argued that the vendee had a right to treat the retaking of the goods by the vendor as a dissolution of the contract. I think not; because the contract can only be dissolved by the consent of both the contracting parties, and here was no consent of the vendee.

Rule absolute for a new trial.

GOOD v. CHEESMAN. May 4.

A debtor being unable to meet the demands of his creditors, they signed an agreement (which was assented to by the debtor), to accept payment by his covenanting to pay two-thirds of his annual income to a trustee of their nomination, and give a warrant of attorney as a collateral security. The creditors never nominated a trustee, and the agreement was not acted upon, and one of the creditors brought an action against the debtor for his demand. The debtor appeared to have been always willing to perform his part of the engagement:

Held, that the agreement, though not properly an accord and satisfaction, was still a good defence on the general issue, as it constituted a valid new contract between the creditors and the debtor, capable of being immediately enforced, and the consideration for which to each creditor was the forbearance of the rest; and as there appeared no failure of performance on the part of the debtor.

ASSUMPSIT by the plaintiff as drawer against the defendant as acceptor of two bills of exchange. Plea, the general issue. At the trial before Lord Tenterden, C. J., at the sittings in London after Trinity term 1830, it was proved, on behalf of the defendant, that after the bills became due, and before the commencement of this action, the plaintiff and three other creditors of the defendant met together, in consequence of a communication from him, and signed the following memorandum:—"Whereas William Cheesman of Portsea, brewer, is indebted to us for goods sold and delivered, and being unable to make an immediate payment thereof, we have agreed to accept payment of the same by his covenanting and agreeing to pay to a trustee of

*329] *our nomination one-third of his annual income, and executing a warrant of attorney as a collateral security until payment thereof. As witness our hands this 31st of October, 1829.* It did not appear whether or not the defendant was present when this paper was signed, nor did he ever sign it; but it was in his possession at the time of the trial, and he had procured it to be stamped. At the time of the signature, the defendant had other creditors than the four above mentioned, and particularly one Gloge, to whom he had given a warrant of attorney, on which judgment had been entered up; and it was agreed, at the meeting of the 31st of October, that if Gloge would come into the arrangement there made, an additional 20% per annum should be set apart by the defendant out of his income. The defendant, on the 16th of November, 1829, wrote to the plaintiff as follows:—"If you should see Mr. Wooldridge" (one of the creditors who signed) "to-day, I should be glad if you would endeavour to be at my house any noon that you may be down, as there is an objection to the arrangement by Mr. Gloge, the particulars of which I will explain when I see you. I am sorry to be so troublesome; but, of course, I am anxious the thing should be settled." Gloge never acceded to the agreement, nor was any trustee ever nominated, or covenant entered into, or warrant of attorney executed, as therein mentioned. The bills of exchange continuing wholly unpaid, this action was commenced. The Lord Chief Justice left it to the jury, as the only question of fact in the case, whether the agreement entered into by the four creditors was conditional only, depending on Gloge's assent, or absolute; in the latter case, he was of opinion that the defendant was entitled to a verdict. The jury found for *330] the defendant, *but leave was given to move to enter a verdict for the plaintiff. A rule nisi having been obtained accordingly,

Scotland now showed cause. The objection taken is, that the supposed agreement for forbearance in this case is an accord without satisfaction; that the consideration for the plaintiff's alleged promise to give time and take his debt by instalments having altogether failed, his engagement to that effect is no answer to the present action. But this is not a case of accord, strictly speaking; nor is it to be governed by the rigid technical rules applicable to that subject. It is the substitution of a new contract, by which the creditors who are parties to it agree to suspend the remedy for the recovery of their respective demands. Such agreements have been supported in modern cases; and there is a sufficient consideration; for where several creditors join in an undertaking of this kind, it is a good consideration to each that the rest subscribe, and, in so doing, give up a part of their present rights for the general advantage: and every one is bound unless he can show that the debtor has refused to fulfil the agreement. *Boothbey v. Sowden*, 3 Camp. 175. Here the first act in fulfilment of the contract, namely, the nomination of a trustee, was to be performed by the creditors; and this, at all events, ought to have been done before they could consider themselves as remitted to their former rights by any failure on the part of the debtor. *Tatlock v. Smith*, 6 Bingh. 339. But no such failure has in fact been shown; for the defendant's letter, which was read at the trial on behalf of the plaintiff *331] to prove that the defendant had abandoned the *contract, proves the contrary. The ground on which a creditor, having joined with others in admitting the debtor to a composition, is precluded from afterwards suing him, is the fraud which would thereby be practised on the rest of the creditors; *Butler v. Rhodes*, 1 Esp. 236, *Wood v. Roberts*, 2 Stark. 417. The same principle may be deduced from *Cockshott v. Bennett*, 2 T. R. 763, and *Steinman v. Magnus*, 11 East, 390. It is true, in the present case, the agreement was not signed by the defendant; but his adoption of it is shown by his subsequent letter, and by his procuring the paper to be stamped.

Follett, contra. The main answer to this defence is, that the accord, if any, was without satisfaction, and the defendant was never released. The agreement of the four creditors was altogether executory, and nothing was done upon it: there is no ground, therefore, for arguing, as in some of the cases cited, that the plaintiff has induced others to join him in an *act*, from the consequence of which

he now seeks to relieve himself individually. None of the creditors were bound unless the agreement was carried into effect. When accord and satisfaction are pleaded, it is quite usual to traverse the averment of acceptance; and this is a complete answer to the plea. Here no acceptance had, in fact, taken place before the action was brought; the creditors, therefore, were not bound; and while a bargain is in fieri any party may retract, if he has not as yet altered the situation of third persons. Where third parties are not affected, a creditor, agreeing by parol to take a less sum than his entire debt, is not thereby precluded from afterwards suing for the whole. In *Heatheote v. *Crookshanks*, 2 T. R. 24, it was held that such an agreement among the creditors, not having [*332] been followed by actual acceptance, was not obligatory. [LITTLEDALE, J. It was observed there by Buller, J., that no fund was appropriated for the payment of the debt; and that if the debtor had assigned over all his effects to a trustee for distribution among the creditors, that would have been a good consideration for a promise of forbearance. PARKE, J. It did not appear by the pleadings in that case that the creditors agreed to forbear. Here it may be inferred that they did.] Still it was a question discussed by the Court, whether an agreement to forbear, under such circumstances, was binding; and they thought it was not. Lord Ellenborough lays it down in *Steinman v. Magnus*, 11 East, 393, that, in the absence of fraud on other parties, a simple agreement by a creditor to accept less than his just demand will not bind him. The non-completion of the agreement in the present case was the fault of the defendant; for, according to *Cranley v. Hilary*, 2 M. & S. 120 (where Lord Ellenborough seemed inclined to reconsider his former opinion in *Boothbey v. Sowden*, 3 Campb. 175), the person to be discharged is bound to do the act which is to discharge him, and not the other party. It was his business to seek out the creditors, procure the nomination of a trustee, and tender the necessary securities. If the defendant, instead of the general issue, had pleaded accord and satisfaction, it would not have been sufficient to show a parol agreement by the plaintiff and other creditors to receive less than their demands; the defendant must have averred an execution by himself of an assignment or warrant of attorney, or something [*333] tantamount, in fulfilment of his part of the accord, and an acceptance by them: for "every accord ought to be full, perfect, and complete;" and "if the thing be to be performed at a day to come, tender and refusal is not sufficient without actual satisfaction and acceptance." *Peytoe's case*, 9 Rep. 79 b.

Lord TENTERDEN, C. J. Upon the whole, I am of opinion that the verdict in this case was right. On the evidence it must be taken that the defendant assented to the composition, and would have been willing to assign a third of his income to a trustee nominated by the creditors, and execute a warrant of attorney, as required by the agreement; but he could not do so unless the creditors would appoint a trustee to whom such assignment could be made, or warrant of attorney executed. That no such appointment took place was the fault of the creditors, not of the defendant. It certainly appears that this was not an accord and satisfaction properly and strictly so called, but it was a consent by the parties signing the agreement to forbear enforcing their demands, in consideration of their own mutual engagement of forbearance; the defendant, at the same time, promising to make over a part of his income, and to execute a warrant of attorney, which would have given the trustee an immediate right for their benefit. Then is not this a case where each creditor is bound in consequence of the agreement of the rest? It appears to me that it is so, both on principle and on the authority of the cases in which it has been held that a creditor shall not bring an action, where others have been induced to join him in a composition *with the debtor; each party giving the rest reason to [*334] believe that, in consequence of such engagement, his demand will not be enforced. This is, in fact, a new agreement, substituted for the original contract with the debtor; the consideration to each creditor being the engagement of the others not to press their individual claims.

LITTLEDALE, J. This is not strictly an accord and satisfaction or a release,

but it is a new agreement between the creditor and debtor, such as might very well be entered into on a valid consideration. It was not necessary in this particular case that there should be an actual assignment, or execution of a warrant of attorney: if it only rested with the plaintiff and the other creditors that the contract should be carried into effect, and the defendant was always ready to do his part, it is the same as if he had actually executed an assignment or warrant of attorney. This case, therefore, is different from *Heathcote v. Crookshanks*, 2 T. R. 24. And it would be unjust that the plaintiff by this action should prejudice the other three creditors, each of whom signed the agreement, and has since neglected the recovery of his demand, under a persuasion that none of the parties to the memorandum would proceed against the defendant.

PARKE, J. I am of opinion that the verdict was right. By the agreement entered into among these parties, the defendant was to give, and the creditors to *335] accept, certain securities for payment in the manner *there stipulated; and upon the faith of that compromise the three creditors who signed with the plaintiff have postponed their demands. Then, cannot this transaction be pleaded in bar to the present suit? It is laid down in *Com. Dig. Accord* (B 4), that an accord with mutual promises to perform is good, though the thing be not performed at the time of action; for the party has a remedy to compel the performance: but the remedy ought to be such that the party might have taken it upon the mutual promise at the time of the agreement. Here each creditor entered into a new agreement with the defendant, the consideration of which, to the creditor, was a forbearance by all the other creditors who were parties, to insist upon their claims. Assumpsit would have lain on either side to enforce performance of this agreement, if it had been shown that the party suing had, as far as lay in him, fulfilled his own share of the contract. I think, therefore, that a mutual engagement like this, with an immediate remedy given for non-performance, although it did not amount to a satisfaction, was in the nature of it, and a sufficient answer to the action.

PATTESON, J. The question is, whether or not this agreement was binding on the plaintiff. I think it was. The agreement was entered into by him on a good consideration, namely, the undertaking of the other creditors who signed the paper at the same time with him, on the faith, which every one was induced to entertain, of a forbearance by all to the debtor. Rule discharged.

*336]

*GARDINER v. WILLIAMSON. May 4.

By an instrument not under seal, A. agreed to let to B. on lease the rectory of L., and the tithes arising from the lands in the parish of L., and also a messuage used as a homestead for collecting the tithes, at the yearly rent of 200*l*. The rent being in arrear, A. distrained, and B. having brought trespass, it was held, that the distress was altogether unlawful, because the agreement not being under seal, did not operate as a demise of the tithes, and no distinct rent was reserved for the homestead.

TRESPASS for breaking and entering the messuage and closes of the plaintiff, and staying and continuing therein for a long space of time. Plea, not guilty. At the trial before Garrow, B., at the Summer assizes for the county of Sussex, 1830, it appeared that the defendant, Williamson, by agreement, not under seal, made the 2d of April, 1829, agreed to let to the plaintiff, and he agreed to take on lease, for three years, the rectory or parsonage of Lindfield, in the county of Sussex, together with all manner of tithes and tenths arising, growing, increasing, or renewing yearly from the lands in the parish of Lindfield, *and also all that messuage situate on Walstead Common, in the parish of Lindfield, which had been accustomed to be used as a homestead for collecting the tithes*, at the yearly rent of 200*l*., payable quarterly. The rent being in arrear, the defendant Williamson distrained; and the trespass complained of was committed by

him and the other defendants acting in his aid in executing the distress. It was contended that a landlord cannot distrain unless there be an actual demise to the tenant at a fixed rent, *Dunk v. Hunter*, 5 B. & A. 322; and that the agreement not being under seal, did not operate as a demise of the tithes. On the other hand, it was conceded that the tithes, being an incorporeal hereditament, did not pass by the parol agreement; but it was said *that the homestead did, [*337 and that some portion of the rent accrued due in respect of that, and therefore the distress was lawful. The learned Judge was of this opinion, and nonsuited the plaintiff. A rule nisi had been obtained for setting aside the nonsuit, on the ground that the defendants had no right to distrain, inasmuch as the tithe, being an incorporeal hereditament, did not pass by the agreement, and there was no separate rent reserved for the homestead.

Long now showed cause. The agreement not being under seal, could not operate as a demise of the tithes, but it may as a sale of the tithes, and a demise of the homestead for three years; and, as one entire rent is reserved for the tithes and the homestead, some portion of it must have issued out of the latter, and for that portion, whatever it may be, the distress was good, *Honeycomb v. Swete*, Cro. Jac. 669, and *Bernard v. Evens*, 1 Lev. 24. [Lord TENTERDEN, C. J. I have great difficulty in saying that this agreement can operate as a sale of the tithes. I think the contract as respects the tithes is invalid, and, if that be so, the plaintiff may take the tithes herself; and then supposing the agreement might operate as a demise of the homestead, still there is no certain ascertained sum reserved in respect of it.] If a lease be made of land and tithes together, rendering rent, the rent is only issuing out of the land, and not out of the tithes, *Smith v. Bowles*, 2 Rolle's Abr. 451. [PARKE, J. The reason assigned is, because there cannot be any distress there but out of the land.]

**Hutchinson* (with whom were *Thesiger* and *Channell*), *contrd.* Every [*338 rent must be reserved out of lands and tenements which are manurable, and upon which a lessor may distrain, and not out of an incorporeal hereditament, Co. Litt. 47 a. It was formerly held that the reservation of a payment upon a lease of tithes was not to be considered a reservation of rent, because it was to issue out of an incorporeal hereditament, which could not be distrained nor put in view in an assize, *Talentine v. Denton*, Cro. Jac. 111, *Rickman v. Garth*, Cro. Jac. 173. This Court, however, appears to have been of a different opinion in *The Dean and Chapter of Windsor v. Gover*, 2 Saund. 302. But although such a reservation will bind the lessees by way of contract, the rent cannot be made the subject of a distress. (He was then stopped by the Court.)

Lord TENTERDEN, C. J. It is perfectly clear that, in point of law, tithes, being an incorporeal hereditament, cannot pass by parol, but by deed only. The agreement in question, therefore, was void as to the tithes. One entire rent of 200*l.* is reserved in respect of the tithes and of the homestead. Now, assuming that if tithes be demised, together with corporeal hereditaments, the rent issues out of the latter only; here was no valid demise of the tithes, and there could, therefore, be no lawful distress, unless some ascertained distinct sum had been reserved in respect of the homestead, which was not the case. There has, then, been no valid demise of the whole subject-matter, nor any distinct rent reserved for that part of it for which there might have been a [*339 legal *distress; and, consequently, the distress was altogether unlawful.

LITTLEDALE, J. I am of the same opinion. Rent cannot issue out of an incorporeal hereditament, so as to warrant a distress; and though, if there had been by one deed a demise of tithes, and also of a corporeal hereditament, it might then have been made a question, whether the rent issued out of the latter; here, there having been no valid demise of the tithes, that question does not arise.

PARKE, J. The agreement, which purports to be a parol demise of land and tithes, cannot operate in point of law as a demise of the tithes. As to them, therefore, the contract is void. It is impossible to say that all the rent in this case is reserved in respect of the land only; and there can be no distress for rent

issuing out of any incorporeal hereditament. The rent is payable for, though it does not issue out of, the tithes. That distinction is taken by Saunders, in argument, in *The Dean and Chapter of Windsor v. Gover*, 2 Saund. 303. He there says, "If a barn with a portion of tithes be demised, reserving 100*l.* a year rent, it is reserved as well in respect of the tithes as of the barn; and if the tithes are evicted the rent must be apportioned, for otherwise such a lessee will pay 100*l.* a year, being the whole rent, for the barn, which, perhaps, is not of the yearly value of 40*s.*, which would be against all reason and justice. And so is the case of *Doubitofte v. Curteene*, Cro. Jac. 452. And it is there said, *340] *that though the rent in such case is only issuing out of the barn in point of remedy, yet it is issuing out of both, as well the tithes as the barn, in point of render." So here, the rent of 200*l.* issues out of the tithes as well as the homestead; and there is no fixed sum reserved in respect of the latter: there could, therefore, be no valid distress.

PATTESON, J. I think the distress here cannot be supported; for, even assuming that the agreement might operate as a sale of the tithes for three years, and a demise of the homestead for the same period, there is one entire yearly payment reserved for both: but a distress can only be, by law, in respect of a fixed ascertained rent reserved out of land; and here, no fixed certain rent was reserved in respect of the land.

Rule absolute for a new trial.

*341] *Ex parte ANN FARLOW, in the Matter of the HUNGERFORD Market Company. May 5.

By statute 11 G. 4, c. lxx., the Hungerford Market Company are empowered to purchase certain property, and the leases, &c., of premises on it; and the lessees and tenants for years or at will are to give up possession at three months' notice, but compensation is to be made to any such tenant required to quit before the expiration of his term. Sect. 19 provides, that all tenants for years, from year to year, or at will, "who shall sustain any loss, damage, or injury in respect of any interest whatsoever for good-will, improvements, tenant's fixtures, or otherwise, which they now enjoy, by reason of the passing of this act," shall be entitled to compensation, to be assessed, if necessary, by a jury.

A tenant from year to year was ejected by the company, but received a regular half-year's notice to quit. It appeared that she had been many years in possession; and that the tenancy was not likely to have been determined if the act had not passed: Held, that she was entitled to compensation for the whole marketable interest which she had in the premises at the time when the act passed; and that the good-will, though of premises on so uncertain a tenure, was protected by the act as an interest which would, practically, have been valuable as between the tenant and a purchaser, though it was not a legal interest as against the landlord.

Otherwise, where the tenancy was from year to year, determinable at three months' notice ending with the year, and with a stipulation against underletting without leave.

In a case said to come within the protection of the act, where the company had brought ejectment, the Court refused to stay proceedings till compensation should be made, or a jury summoned.

THE *Attorney-General*, in Hilary term, obtained a rule nisi for a mandamus to the Hungerford Market Company, to cause a jury to be summoned according to the statute in that behalf, to assess compensation for the injury which Ann Farlow would sustain by being obliged to leave certain premises occupied by her in Little Hungerford Street, in or near the Hungerford House estate, which premises the company had purchased of the Rev. Henry Wise; "and for loss, damage, or injury in respect of any interest whatsoever for good-will, improvements, tenant's fixtures, or otherwise," which the said Ann Farlow might sustain by reason of the passing of the act.

The company was incorporated by statute 11 G. 4, c. lxx., for the purpose of re-establishing (on a more extended plan) the market originally granted by King Charles II. to Sir Edward Hungerford, K. B., and his heirs, to be holden within a certain messuage called Hungerford House or Hungerford Inn, in or near the

*342] *Strand. The act, after reciting that the company had contracted to purchase the premises called Hungerford Market, wharf and stairs, &c., em-

powered them to buy in any of the subsisting leases or agreements for leases on any part of the said premises. And by sect. 17 it was enacted, that every lessee or tenant for years or at will, and every other person in possession of any messuages, &c., which should be purchased by virtue of the act, should deliver up possession to the company at three months' notice, the company making such compensation to the tenant or lessee, in case he should be required to quit before the expiration of his term, as they should think reasonable; and that in case of dispute the compensation should be settled by a jury, to be summoned as the act directed. Section 19 provides, that all or any person or persons, tenant or tenants for years, from year to year, or at will, occupier or occupiers of any part of the market and other hereditaments forming the said estate called Hungerford House, &c., or therewith contracted to be purchased by the company, who "shall or may sustain or be put unto any loss, damage, or injury in respect of any interest whatsoever, for good-will, improvements, tenant's fixtures, or otherwise, which they now enjoy by reason of the passing of this act," shall receive compensation from the company in the manner prescribed by a former section, namely, by the assessment of a jury, if terms cannot otherwise be agreed upon.

Ann Farlow was the widow of a person who had carried on the business of a carman and lighterman on premises forming part of the estate purchased by the company. It did not appear that he had any lease; but he and his father had been tenants of the property in question for sixty years. The widow occupied them *from the time of her husband's death, as tenant from year to year, and continued the business. At Midsummer 1830, after the passing of the act, she, and other yearly tenants on the estate, received notice to quit; and she, in consequence, required the company either to give her compensation for the damage she would sustain by being turned out of the premises, or to summon a jury according to the act. In support of the present rule it was sworn, that the loss to this party, in respect of connexion and other local advantages, would be very great; that her husband had laid out large sums of money on the premises, being assured by the then proprietor, from whom the company purchased, that he should not be disturbed in his possession as long as the rent was duly paid; which had been done both before and since his death. On the expiration of the time specified in the notice to quit, an ejectment was brought on behalf of the company; and while this rule was depending they recovered possession. Affidavits were filed by the company in opposition to the rule, but were not used, the Court being of opinion that they came too late. [*343]

Sir *James Scarlett* and *Follett* now showed cause. There is no ground for the claim of compensation. This is not a proceeding under the statute, but by regular notice to quit at the expiration of the year. Section 17 expressly provides that compensation is to be given where a tenant shall be required to quit before the expiration of his term; and although section 19 directs that recompense shall be made to all tenants sustaining injury in respect of any interest whatsoever for good-will, &c., by reason of the passing of the act, that *can only extend to legal interests. Here no legal interest could subsist after the expiration of the notice to quit; the tenancy was determined by the ordinary course of law, as it might have been if the statute had never passed. As to the fixtures there will be no dispute. [*344]

The *Attorney-General* and *Law, contrd.* The company only exists by the act of parliament; and it was clearly the object of the legislature to take care, while establishing them, that no injury should in any respect accrue to a large body of persons who had long been carrying on trade upon this property. The enactment of section 19 is large and novel: it provides compensation for all persons who shall suffer in any interest for good-will, &c., which they *now* enjoy; that is, at the passing of the act. At that time the party making the present application enjoyed an interest which, though nominally subsisting but from year to year, might in reality be considered permanent, but for this statute; and would have been treated as such in any bargain with a purchaser. She is therefore entitled to compensation for a substantial marketable interest which then existed,

in the good-will, improvements, and tenant's fixtures, and which interest was disturbed, and its value taken away, by this act of the legislature. Section 17 only refers to tenants dispossessed before their terms expire; section 19 must have some additional meaning, and can only be understood as referring to the kind of interest which is here in question.

LORD TENTERDEN, C. J. I am of opinion that in this case a mandamus ought to go. It appears by the statute that a contract had been made by a new *345] company to purchase a very considerable estate, used as a market. The act empowers them, when the estate shall have been conveyed, to treat for, purchase, and take any of the subsisting leases, or agreements for leases, of or in any part of the premises; and by section 17 it is enacted that every lessee or tenant for years, or at will, of any premises which shall be purchased by virtue of the act, shall deliver up possession to the company upon three months' notice to quit, compensation being made (which in case of dispute is to be settled by a jury), if any such tenant be required to quit before the expiration of his term. Then comes the nineteenth section; and this appears to me, on the whole view of it, to have been intended to provide for that feeble and imperfect interest which many occupiers had in the premises to be contracted for by this company. It was likely to be foreseen by the legislature that when the company was established, and the proceedings taken which this act had in view, many occupiers of premises in the old market would be dispossessed; and if it was considered that this might be done in the ordinary way, by ejectment, and that the parties should then have no right or claim against the company, I do not see why the nineteenth section should have been framed. That section is certainly obscure, and incorrectly worded; but it provides compensation for all persons who shall sustain any damage or injury, "in respect of any interest whatsoever, for good-will, improvements, tenant's fixtures, or otherwise, which they now enjoy, by reason of the passing of this act." Now it seems perfectly clear that if this act had not passed, the tenants and occupiers would not have been all dispossessed, as they will be under the act. It is said "the interest *346] *which they now enjoy" must be taken to mean a legal interest, and that all legal interest was determined by the notice to quit. But I think this is not the fair meaning of the words, and that they must be understood as signifying that sort of right which an occupier ordinarily has, of parting with his tenancy to another person for such sum as he may be induced to give for good-will, fixtures, and improvements, and which is often very considerable though the tenancy be only from year to year, where there is a confidence that it will not be put an end to. This interest, feeble as it may be (since it is always determinable at a short notice), may justly be considered as matter of value to the owner, and to any other party who becomes the purchaser. In a transaction between landlord and tenant, the "good-will" could not be a subject of consideration. I think, therefore, that the word "interest" in the nineteenth section must be understood, not of a strict legal interest, but of that which in common parlance is called interest in the good-will, and which is usually a subject of sale between an occupier and a person about to come into his place, however infirm the right may be, and however short the legal term of enjoyment.

LITTLEDALE, J. The section is obscure; but reading it as if the words "by reason of the passing of this act" came after the words "damage or injury," the only question is, whether this person has been put to any loss, damage, or injury, by reason of the passing of the act, in respect of any interest for good-will or otherwise, which she then enjoyed? When the act passed she had at least a term of six months unexpired in the premises; she had therefore some interest *347] in the good-will at that time; *and she has been deprived of it by reason of the passing of the act. It is perhaps true, that in strict legal consideration there may be no interest in a good-will; but we know that there is practically such an interest, which is usually a subject of sale. That interest the legislature seems to have contemplated in this section; and it was one which this party, though only a yearly tenant, would in all probability have continued

to enjoy undisturbed if the act had not passed. The amount of compensation, however, will be for a jury. I think the mandamus ought to go.

PARKE, J. If the company could have purchased these premises without the assistance of an act of parliament, no doubt they might have turned out the present applicant without any compensation, but such as she might have been entitled to by her bargain with the landlord from whom they purchased. But they have come to parliament to be made a corporation, and to be invested with peculiar powers; and the legislature appears to have intended that the occupiers of the old market should not suffer by the exercise of these powers without a compensation for such interests as would be affected by the act. The only doubt I have had was, whether the language used was sufficient to carry the intention into effect; but I think the words of the nineteenth section are so. It cannot have been intended merely to place the tenant in the same situation with respect to the company as he would have been with the landlord at the determination of his tenancy, for any provision to that effect would have been unnecessary; and besides, the tenant has no "interest for good-will" as against the landlord. It seems to me that the enactment *was meant to apply to the state of things at the time of passing the statute, and to give compensa- [*348] tion for the power which the occupier then had to dispose of the good-will and other advantages in the usual manner to an incoming tenant, in the expectation that the tenancy would not be put an end to. The object appears, on the whole, to have been, that the tenant should be placed as far as possible in the same situation as if the act had not passed.

PATTESON, J. I have also had some difficulty in the construction of this clause, but I think the words "any interest for good-will" clearly show that the legislature did not contemplate a legal interest as between landlord and tenant; for no interest in the good-will could be insisted upon against a landlord, who, at the time of passing the act, would have been entitled to put an end to the tenancy at half a year's notice. Then, as the words must have some signification, I think they must be understood to mean that the company is to make compensation to the tenant in the same manner as an ordinary purchaser taking a yearly tenancy with the incidents commonly attending it. Rule absolute. (a)

A similar rule nisi for a mandamus to the company was obtained on the part of Joseph Wright, another tenant of premises in the market, on affidavits nearly resembling those made use of in the above case. Sir James *Scarlett [*349] and Follett showed cause in Trinity term, 1831, and the Attorney General and Law were heard *contrà*; but it appeared, on the affidavits now filed by the company, that the party applying had held under the landlord, Mr. Wise, of whom the company purchased, on an agreement for one year certain from Michaelmas 1822, with liberty to the landlord afterwards to determine the tenancy in any year at three months' notice, and with a stipulation also that the tenant should not underlet or give up possession of the premises without leave in writing. The Court was of opinion that these conditions of holding, especially the last, essentially distinguished this case from the preceding, and the rule was discharged; as also were two other rules obtained under circumstances not materially differing.

In the following Michaelmas term, *Kelly* obtained a rule on the application of a party named Lee, against whom the company had brought ejectments, under similar circumstances to those last stated, calling on the lessors of the plaintiff to show cause why proceedings should not be stayed till they should have made compensation to the defendant for his interest, good-will, and fixtures, according to the act, or summoned a jury for that purpose. Sir James Scarlett and Follett showed cause; and *Kelly*, *contrà*, insisted that, by the provisions of the act, the making compensation was a condition precedent to determining the possession. The Court, however, held, that this view of the statute, assuming it to be cor-

(a) A motion for costs was afterwards made in this case, for the grounds and result of which see *Rex v. The Hungerford Market Company*, ante, p. 204, note (a).

rect, might form an answer to the action of ejectment, but furnished no ground for the interference of the court; and this, and three other rules in similar cases, were discharged.

***350] *WILSON, Baronet, v. HOARE and Thirteen Others. May 5.**

A copyhold estate was vested in fourteen trustees, and by a decree of the Court of Chancery, made in a suit to which the lord of the manor and the trustees for the time being were parties, it was ordered, that when at any time the number of the trustees should be reduced to five, the lord should, with the approbation of a Master in Chancery, nominate nine others to be added to the five, to whose use a new surrender should be made, and that the lord should admit them on paying a reasonable fine. The annual value of the estate was 1000*l.*:

Held, that 5*657l.* 1*9s.* was an unreasonable fine on the admission of fourteen trustees; and that the proper mode of assessing the fine was to take, for the first life, two years' improved value; for the second life, one half of the sum taken for the first; and for the third life, one half the sum taken for the second; and so on.

ASSUMPSIT by the lord of the manor of Hampstead for fines on admission of the defendants to a copyhold tenement. Plea, the general issue. At the trial before Parke, J., at the Middlesex sittings after Trinity term 1830, the following appeared to be the facts of the case:—The plaintiff was, before and on the 13th of July, 1826, and still is, lord of the manor of Hampstead, in the county of Middlesex. On the 20th of December, 1698, the Earl of Gainsborough, being lord, and seised in fee, of the said manor, at a court baron then held for the manor by his steward, and with the consent of the homagers, granted by copy of court roll to Sir Thomas Lane, and thirteen other persons therein named, six acres of heath ground, part of Hamstead Heath, lying and being about and encompassing the well of medicinal waters (as the same was staked and set out by certain of the homagers for that purpose), to hold to Sir T. Lane and the other grantees, their heirs and assigns, at the will of the lord, according to the custom of the said manor of Hampstead, at the yearly rent of 5*s.* By indenture dated the 20th of December, 1698, between the Honourable Susannah Noel,

***351]** widow, mother of the *said Earl, then an infant, of the one part, and the said grantees of the other part, reciting the said grant, it was declared and agreed by the parties thereto, that the grantees should, as trustees, stand seised of the said premises, and all improvements of the same, thereafter to be made, for the sole use and benefit of the poor of the parish of Hampstead, successively for ever; and that they should employ all the rents and profits thereof, and all improvements to be made of the same, after deduction of reasonable expenses, for the benefit of such poor for ever. In a suit instituted in the Court of Chancery in 1729, by the then attorney-general, on the relation of J. B. and W. K., on behalf of themselves and others, inhabitants and poor of the parish of Hampstead, to which the then trustees of the charity and the then lord of the manor, an infant, were parties, it was ordered and decreed, that the charity contained in the copy of court roll and deed declaring the trust of the 20th of December, 1698, should be established, and the lands comprised therein be held and enjoyed according to the said grant, paying the rent of 5*s.* per annum to the lord of the manor, and a reasonable fine upon every surrender and admittance, according to the custom of the said manor; and the trustees being all dead except three (and two of them having declined to act), it was ordered that Mr. Games, the lord of the manor, should, with the approbation of Mr. Elde, one of the Masters of the Court of Chancery, nominate thirteen others of the copyhold tenants of the manor of Hampstead, and inhabitants of the said parish, to make up the original number of fourteen trustees; that the defendants, the three

***352]** *surviving trustees, should surrender the premises to the use of the one who was willing to act, and the said thirteen other persons and their heirs, on the trusts contained in the deed of the 20th of December, 1698, and that the lord of the manor for the time being should admit them, paying a reasonable

fine; and when, at any time thereafter, the number of the said trustees should be reduced to five, then the lord of the manor for the time being should, with the approbation of the Master, nominate nine others, qualified as aforesaid, to be added to the five, and a new surrender should be made to their use, on the same trusts; and that the lord of the manor should admit them, paying a reasonable fine. The number of trustees having, in 1826, been reduced to five, nine were selected by the lord, in the manner mentioned in the decree; and on the 13th of July, 1826, the fourteen defendants were duly admitted as trustees to the customary tenements in the declaration mentioned, being the Wells charity estate above described. And it was agreed between the parties that the plaintiff, as lord of the manor, should assess one fine in respect of all the tenements forming the estate, and not several fines upon the respective parts thereof, which had been held by distinct copies of court roll. The plaintiff assessed the fines at 5657l. 19s. Payment was demanded and refused. At the time the defendants were admitted, the tenements were worth by the year 1000l., after deducting the quit rents payable for them to the plaintiff, as lord of the manor.

The fine had been assessed on the following principle:—Two years' value was taken for the first life, *half of two years' value for the second life, a third for the third life, a fourth for the fourth, and so on to the ninth [*353 life: and for the last five lives no additional sum was taken. It appeared that by the custom of the manor, two years' improved value was the fine payable on admission for a single life, and that where more than one life had been admitted, the principle adopted in this case had been acted upon in four instances; two of them being in 1811, one in 1814, and the other in 1824. But the principle more generally adopted on the admission of several lives, was to take two years' improved value for the first life; for the second, one half the sum charged upon the first; for the third, one half the sum taken for the second; and so on. It appeared further, that since 1729, there had been an admission of trustees to this charity once in every nineteen years. In the present case the ages of the trustees (omitting those of the youngest five) were, at the time of the admission, forty-three, forty-four, fifty-two, fifty-four, fifty-seven, fifty-nine, sixty, sixty, and sixty-four. Upon these facts, the learned Judge was of opinion that even if, in an ordinary case of admission for several lives, the principle adopted was right, still, in assessing this fine, it ought to have been taken into consideration that the lord selected the lives, and that vacancies in the trust occurred by resignation as well as by death; and that the jury should weigh those circumstances in deciding whether or not the fine was reasonable. The counsel for the plaintiff intimating that the lord was desirous to have the matter brought before the Court, the learned Judge nonsuited the plaintiff, reserving liberty to him to move to enter a verdict for the amount of the fine assessed, if the Court should *think fit. In Michaelmas term 1830 a rule nisi was accordingly [*354 obtained.

In moving for the rule, *Gurney* stated that the object of the lord was rather to obtain the opinion of the Court as to the principle upon which the fines should be calculated on the admission of future trustees, than to succeed in the present action; and he cited *Taylor v. Pembroke*, which was argued upon a special case in this Court in Michaelmas term 1815, by *Holroyd* for the plaintiff, and *Richardson* for the defendant, where three joint tenants had been admitted to a copyhold tenement in the manor of Sutton Holland, in the county of Lincoln, and the lord of the manor had demanded as a fine for the first life, two years' improved value; for the second, half the sum assessed for the first; and for the third, half the sum assessed for the second. The Court there intimated a strong opinion that the fine was reasonable, inasmuch as it would never amount to four years' improved value; but the case was sent down to a new trial, and the point was not finally decided. In the present term,

Sir *J. Scarlett*, *R. V. Richards*, and *C. H. Bosanquet* showed cause. The nonsuit was right. The lord must assess and declare for the true sum, *Grant v. Astle*, 2 Doug. 731. And he cannot even assess, and then remit part, *Lord Northwick v.*

Stanway, 3 B. & P. 346, 6 East, 56. The plaintiff has not assessed the true sum. The annual value of the premises is admitted to be 1000*l*. The sum demanded is *5657*l*. 19*s*. No buildings have been erected since 1801. Now, the first *355] assessment on the present principle was in February, 1811; there are but four instances given in evidence, and there are no more in the Court Rolls. The plaintiff, therefore, has not proved the allegation in the declaration, that the assessment was according to the custom of the manor. That is fatal. Besides, the principle on which the assessment was made is wrong; if acted on to the full extent, the fine might amount to a sum exceeding the value of the fee-simple. The principle which the plaintiff is now satisfied to abide by, viz. to take for the second life half what the immediate tenant for life pays; for the third, half of the second; and for the fourth, half of the third, and so on (by which means four years' value is never arrived at, it being a decreasing series), is only applicable where persons take in *succession*.(a) This may be a good rule in the case of remainders; but the defendants are joint tenants seised per my et per tout, having one undivided interest, making but one tenant. None of the cases, therefore, in the books, in terms apply to them; being all cases where the lives take *successive*, either having different interests, or being separate tenants, as in *The Earl of Bath v. Abney*, 1 Burr. 217, which was the case of an executor. Then, if the cases do not apply, it is important to show, with reference to *reasonableness*, that the trustees stand in an unusual position, from the mode of their appointment. Considering it as an insurable interest, it is a very singular risk. The *356] lord in the first instance nominates fourteen trustees; but *upon the death or earlier disqualification (by change of residence or resignation) of the first nine, the last five are to surrender their trust, and fourteen new trustees are to be appointed. Therefore the risk is upon nine lives, and those the worst out of the fourteen. Contrary to most risks upon lives, which are in favour of the tenant, the longest lives here are for the benefit of the lord. He has the selection of the lives in the first instance; and when they are put in, he has the benefit of the five best amongst them. The consequence has been, that since the date of the order in Chancery, admissions have been at the rate of one in nineteen years. Now the average duration of a life of thirty years is stated by one actuary at thirty-four years and a half, by another at twenty-nine. Taking then the shortest period, a single trustee would hold the estate for twenty-nine years; whereas the body of trustees, under this mode of appointment, have only held nineteen years on an average. Therefore if, for twenty-nine years, a reasonable fine would be two years' improved value, for nineteen years it should not amount to sixteen months; or, stating it in money, instead of 2000*l*. it should be 1253*l*. Or again, the average duration of the most probable survivor of nine lives, at ages from thirty to sixty, is calculated at about forty years, which would reduce the fine lower still; to eleven months' improved value, or in money value under 1000*l*. It appears that the ages of the present trustees, omitting the youngest five (as the most probable survivors), were from forty-three to sixty-four: the average of their ages being nearly fifty-five. The defendants, *357] therefore, have not the *benefit of even a single good life. The most they can be called upon to pay is such sum as bears the same proportion to 2000*l*. which the risk they run does to a good life of twenty-nine years, viz. 1253*l*. Lastly, the trustees are not *beneficially* interested; they represent a charity; and in construing the word *reasonable* in the Chancellor's order, regard must be had to that fact. It is not probable, that if the Lord Chancellor had intended the word in its legal sense of "not more than two years' improved value," he would have allowed the lord of the manor to nominate his own lives, subject only to the approval of a Master in Chancery. And that approval, no doubt, had reference to the *qualifications* and *respectability* of the persons who were to have the care of the charity concerns. The lord granted the land in the first instance, without consideration, for the benefit of the charity; and it might have been expected that what was voluntarily given, was not intended afterwards to be

(a) 1 Watkins on Copyh. 483, 2d edit.

a subject of emolument. It is, however, too late now, since the order in question, to contend that no fine should be paid; but for the reasons given, both the principle adopted upon the record, and that which the plaintiff has endeavoured to support in argument, are equally inapplicable.

Gurney and Scriven, Serjt., for the defendants. It is for the copyholder to show that the fine was unreasonable, and not for the lord to show it was reasonable, *Denny v. Lemman*, Hob. 135. The fine is reasonable and consistent with the custom as alleged in the declaration. There is a general custom as to fines affecting all manors; and *that must prevail where a special usage to the contrary is not shown to exist. Now, by the general custom, the lord is entitled, upon the admission of a single life, to have two years' value; and of two or more lives, an increased fine in proportion to the number of lives. No case of copyholds held for life has been found, wherein more than three lives in possession have been admitted. The usage, frequently, is to grant copyholds in reversion; and in those cases the fines are regulated by the custom of the manor. [PARKE, J. Where three lives are admitted as joint tenants, and the property is worth 1000*l.* a year, has the fine (calculated on the principle of the fine in this case) been 3500*l.*?] The case of joint tenants is now for the first time before the Court. In the case of tenants in common, each must pay for his share, and each is admitted to his several part only. In the case of joint tenants one fine only is payable for the whole: on the death of tenants in common, the lord will have a fine on the death of each; in the case of joint tenants, he will have no fine till the survivor dies. If there are two successive estates for life in a copyhold, the admittance of the first admits all; but as each succeeds to the possession he must pay a fine, though not a whole fine, *Kitchen*, 241. It is said in Co. Copy. s. 56, that if copyholds be granted to three successive, each, as he succeeds, must pay a fine; therefore, if all three live to occupy, they will pay six years' value: can it be unreasonable, then, to pay in the first instance a half fine for the second life, one fourth for the third? The general rule undoubtedly is so, and it was recognised in *Lord Bath v. Abney*, 1 Burr. 217, and **Taylor v. Pembroke*, ante, p. 354. But there is nothing to show that a fine assessed on the principle adopted in this case is unreasonable. [PARKE, J. According to the principle of calculation generally adopted, the fine can never amount to four years' improved value. The greater the number of lives, the nearer it will approach to it; but being a decreasing series, it will never reach it.] Though that be the custom in many manors, still the question in this case is, whether the fine or the principle on which it is assessed be reasonable, and there is nothing to show that it is not so. [LITTLEDALE, J. If there were 200 or more lives, the fine might possibly exceed the value of the estate.] Assuming that the lord, in assessing the amount of the fine, ought to have taken into his consideration his right of nomination or selection, controlled as it is by the Master in Chancery, and the advantage likely to accrue to him by resignation of the trustees; and that those circumstances would have the effect of cutting down the fine; still it would have been competent to the lord, if the case had proceeded, to have proved other circumstances which might have shown the propriety of increasing the fine, and then it would have been a question, under all the circumstances to be submitted to the jury, whether the fine were reasonable or not. The question not having been left to the jury, the nonsuit was clearly wrong. The object of the lord, however, is to have the principle settled on which fines are to be assessed in future; and therefore he is willing, and even desirous *that the present rule should be discharged, if the Court will lay down the principle to be adopted from henceforward. [358] [359] [360]

Cur. adv. vult.

Lord TENTERDEN, C. J., now delivered the judgment of the Court.

According to the terms of the decree respecting this charity, when the fourteen trustees are reduced to five, it is requisite there should be a new admission. The number had been reduced to five, and fourteen new lives were admitted. Double the yearly value for one life is 2000*l.* Sir Thomas Wilson had assessed the fine at 565*l.* 19*s.* The question was, whether that was a good assessment,

or a sum excessive and unreasonable : if the latter, the plaintiff could not recover. That was the opinion of my Brother Parke upon the trial, and the plaintiff was nonsuited. We are of opinion that the nonsuit ought not to be set aside, the sum charged being an excessive and unreasonable fine.

We might content ourselves with saying that, and no more ; but we have been requested, for the sake of enabling all parties to know what their rights are, to say what ought to be the proper fine : and our opinion is, that the proper mode of estimating the fine is to take, for the second life, half the sum taken for the first ; for the third, half the sum taken for the second ; and for the fourth, half that which is taken for the third ; and so on. The effect of that will be, that you can never quite arrive at double the sum taken upon the first life, whereas *361] the fine at present assessed very much exceeds *that ; for the principle on which it was assessed was this : two years' value was taken for the first life ; half of that for the second life ; a third for the third life ; a fourth for the fourth, and so on to the ninth life. The rule that we have laid down appears to have been the rule approved of in *Taylor v. Pembroke*, and is referred to in the *Earl of Bath v. Abney*, 1 Burr. 211, though it is not very accurately stated either in the margin of the report, or in Watkins's *Treatise on Copyholds*, vol. i., p. 483, 2d edit. There is an inaccurate use of the word "sesqui." It is said that the fine for two lives is the sesqui of that taken for one, and so far it is correct ; and that the fine for three is the sesqui of that taken for two, which is incorrect. The meaning is plain enough, that the sum taken for the third life is the sesqui of that taken for the second. The rule must be discharged.

Rule discharged.

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*The KING v. RICHARD CARLILE.

A return to a writ of error, directed to the commissioners of oyer and terminer of the city of London, set out the record of an indictment found against the defendant, before the lord mayor and others ; and stated that he was tried upon the said indictment by a jury of the country at the next session holden before the lord mayor, several of the judges, aldermen, recorder, and others assigned by certain letters patent under the great seal directed to them, or any two or more of them, to inquire of certain offences ; that he was, by the verdict of such jury, found guilty ; and that thereupon judgment was given by the Court against him. Upon this return the defendant assigned as errors in law, that the judgment was insufficient, and that it should have been for the defendant : and as errors in fact, first, that when the jury gave their verdict there was but one of the justices named in the commission present in Court ; and, secondly, that the verdict was not, at the time it was so given, entered of record. The king's coroner and attorney answered "in nullo est erratum," and prayed that the judgment might be affirmed :

Held, as to the first error in fact, that as it appeared by the record, that the verdict was given at a session holden before several of the commissioners and justices, the plaintiff in error could not be allowed to aver, in contradiction to the record, that only one of the justices was present when the jury gave their verdict : and the answer, in nullo est erratum, is no admission of the fact assigned for error, unless it could lawfully be assigned, and is well assigned in point of form. Held, also, that the second error in fact assigned, was no error, inasmuch as it was impossible that a verdict should be recorded at the time when it was given, the recording of it being necessarily an act subsequent to the delivery of the verdict by a jury.

THIS case was argued on a former day in this term by the defendant in person, and *Wightman* for the crown : the arguments urged and authorities cited are so fully stated and commented on in the judgment delivered by the Court, that it is deemed unnecessary to state them here.

Lord TENTERDEN, C. J., in the course of the term, delivered the judgment of the Court. This case came before the Court upon a writ of error directed to the commissioners of oyer and terminer of the city of London, upon a suggestion of error in the record and process, and in the giving of judgment upon an indictment against Richard Carlile for the publication of a malicious and seditious libel, whereof he was convicted before them ; and commanding them to send the record *363] and process, with all things touching the same, under *their seals or the seal of one of them, on a day therein mentioned, before his majesty, so that in inspecting the record and process he might cause further to be done there-

upon for amending the error, as of right and according to the laws and customs of England should be meet to be done. The return to this writ was made by the lord mayor of London, and it contained the record of an indictment found before the lord mayor and others, by virtue of a commission under the great seal, directed to the justices therein named, and others, or any two or more of them, to inquire of several offences therein particularly named, and all other evil doings, offences, and injuries whatsoever, and to hear and determine the same according to the laws and customs of England. The record then set forth the indictment so found against Richard Carlile, his plea of not guilty, issue joined thereupon, and a day given to the parties at the next session of oyer and terminer. It then proceeded to state, that at the next session holden before the lord mayor, several of the Judges, aldermen, recorder, and others named in the commission, the defendant, Richard Carlile, was tried before a jury of the country, and by their verdict found guilty of the premises charged in the second and third counts of the indictment, and that thereupon judgment was given by the Court against him.

Upon this return, the defendant assigned several errors in law and in fact. The errors in law assigned were, that the indictment was insufficient, and that judgment should have been given thereupon for the defendant, Richard Carlile. The errors in fact assigned were, first, that at the time when the jury gave their verdict *against the defendant, there was but one of the justices named [*364 in the commission present in court; and, secondly, that the verdict was not, at the time it was so given, entered of record. The king's coroner and attorney in this court answered the assignment of errors in these words; viz., "That there is not, either in the record and process aforesaid, or in the giving the judgment aforesaid against the said Richard Carlile, any error; and prays that the Court may proceed to examine as well the record and process aforesaid, as the matters aforesaid above assigned for error, and that the judgment may be affirmed."

Upon this state of the record it appears that the defendant Carlile, who is the plaintiff in error, had assigned errors both in law and in fact, which is irregular, and could not have been allowed, if, on the part of the prosecution, it had been thought right to demur for the duplicity, but that this was waived.

The plaintiff in error was brought before the Court by habeas corpus, and was heard to argue in person in support of his writ of error.

In the course of the argument, we gave our opinion upon the matters in law assigned for error; and it is not now necessary to say more than that the libel of which the defendant has been found guilty is one of a most mischievous and malignant character, and is charged upon the record in due form of law.

Upon the second error in fact assigned, we also gave our opinion, that it was no error in fact, as well because it is impossible that a verdict should be recorded at the time it is given, the record of it being necessarily an act subsequent to the delivery of the verdict by a *jury, as because there is no time fixed [*365 by law for the recording of a verdict; the practice being, that a minute of the verdict should be entered forthwith by the officer of the court, and entered of record with the other proceedings at some subsequent time, when a formal record of the whole may be required. And the minute so entered is considered by the Court in which the proceeding takes place as evidence of the verdict, although the record may not have been regularly drawn up in form.

In support of the first error in fact assigned, reference was made to a passage in the Commentary of Sir William Blackstone, b. 4, c. 30,(a) wherein it is said, that if a commission be directed to two or more persons and others, or any of them, of whom one of the two named shall be one, and the others proceed without the presence of either of the two thus named, all the proceedings are void, and may be falsified upon bare inspection, without the trouble of a writ of error. A doctrine to the same effect is to be found in other writers. It is obvious that this doctrine applies only to cases wherein it appears, upon the face of the

(a) 4 Bla. Comm. p. 390.

proceedings, that they were had in the absence of both the persons, the presence of one of whom was required by the commission; in such a case the proceedings are evidently void upon the bare inspection, and are to be quashed without any writ of error.

To this objection, two answers were offered on behalf of the prosecution :

First, That in the case of a misdemeanor, as this is, a privy verdict may be *366] given,^(a) from whence it was *inferred that a verdict might be received by one commissioner only; and, secondly, that as it appears by the record in the present case, that the verdict was given at a session holden before several of the commissioners and justices, the plaintiff in error could not be allowed to aver that only one of the justices was present when the jury gave their verdict, such an averment being in direct contradiction to the record.

It is not necessary to say anything on the first point, because, upon the second point urged on the behalf of the prosecution, viz. that the allegation of the plaintiff in the writ of error cannot be received, because it is in direct contradiction to the record, we think ourselves bound by the authorities in the books, which are numerous and consistent, to decide that the plaintiff in error cannot be received to make the averment contrary to the record. It is our duty to decide according to the rules and principles of law handed down to us by a series of the decisions of our predecessors; and it is not consonant to the general principles of the administration of justice to allow the judgments of Courts to be vacated upon matters of form, no way connected with the merits of the case; and the mere fact of receiving the verdict of a jury after the trial is certainly an objection of this class: the error assigned is only as to the time of receiving the verdict, and not as to the time of the trial, or of the direction given to the jury.

If error in fact be assigned, the general answer that there is no error in the record or proceedings, is not an admission of the fact, unless the fact can lawfully be assigned for error, and is well assigned in form. In all other cases this *367] general assertion is considered only as *in the nature of a demurrer, bringing the law of the case before the Court for its decision. In the case of *King v. Gosper and Another*, Yelv. 58, which was an assignment of error in fact contrary to the record, the Court say, the defendant, by pleading in *nullo est erratum*, does not confess this to be error, but only puts himself upon the judgment of the Court. In *Okeover v. Overbury*, Sir T. Raym. 231, the rule is laid down by Lord Hale thus: "When error in fact is well assigned for error, in *nullo est erratum* amounts to a confession of the fact; as if infancy be assigned, the plaintiff (i. e. the plaintiff below) cannot plead in *nullo est erratum*, because by it he confesseth the infancy, for he ought to take issue; but if the party assign for error that the Court did not sit, or that the defendant did not appear, which assignments are of matters of fact, but not well made, there in *nullo est erratum* amounts to a demurrer."

The same rule is laid down in more concise terms in an anonymous case, 1 Ventris, 252, which probably was in truth the case last quoted. The same doctrine is to be found in *Hudson v. Banks*, Cro. Jac. 28; and in the case of *Taylor v. Willans*, 1 Bligh, 415, in the House of Lords, in 1827, the opinion of the then Lord Chancellor was to the same effect; and the practice on writs of error has been conformable to this rule.

The authorities are equally clear, that a party cannot be received to aver as error in fact, a matter contrary to the record. In 1 Inst. 260, Lord Coke says, "The rolls being the records or memorials of the Judges of the courts of record, import in them such incontrollable credit and verity, as they admit of no aver- *368] ment, plea, *or proof to the contrary. And if such a record be alleged, and it be pleaded that there is no such record, it shall be tried only by itself; and the reason hereof is apparent, for otherwise (as our old authors say, and that truly) there should never be any end of controversies, which should be inconvenient."

(a) Co. Litt. 227 b; 3 Inst. 110; *Rex v. Lodingham*, Sir T. Raym. 193; See Plowd. 211.

The cases before quoted from Yelverton and Sir Thomas Raymond, are direct authorities upon this point, as well as that for which they were cited; and one of the instances put by Lord Hale, viz., that the Court was not sitting, is very like the present case. Other cases were quoted at the bar upon this point,^(a) and it is unnecessary to repeat them; but it may be proper to observe that one of them, viz., *Molins v. Werby*, 1 Lev. 76, 1 Sid. 94, 1 Keble, 355, is quite analogous to the present. That was a writ of error on a judgment in the palace Court, said to be holden before James Duke of Ormond: the error assigned was, that the Court was not holden before the duke, but before his deputy; and this was held not assignable, being contrary to the record. In the case of *Bowsse v. Cannington*, Cro. Jac. 244, the error assigned was, that one W. B., of Bradfield, was returned upon the jury process, and one W. B., of Metfield, who was another person, and not returned, was sworn. And this was held not assignable for error because contrary to the record, and the party estopped; for otherwise every record might be brought in question upon such surmise. I will mention one more case only, which is a decision upon both points, viz., *Cole v. Green*, 1 Lev. 809. An action of **waste* was brought in the court of hustings of the city of London; there were two trials; upon the first the verdict was for the plaintiff, and upon the second for the defendant, and the judgment was given for the defendant. The plaintiff brought a writ of error, which was heard before several of the Judges assigned for that purpose at St. Martin's le Grand; the errors there assigned are not applicable to the present case. The judgment given for the defendant in the hustings was reversed, and judgment given for the plaintiff on the first verdict. Upon this reversal of the judgment, the original defendant brought a writ of error in the House of Lords, and there assigned for error that the jury did not come out of the four nearest wards, as by the custom of London they ought to do. The defendant in error pleaded in *nullo est erratum*, and upon argument, the Lords, with the advice of the Judges, resolved; first, that this was not assignable for error, being contrary to the record, because the award of the *venire facias* is out of the four nearest wards, and the writ returned served accordingly; and, secondly, that in *nullo est erratum* is a demurrer; and although there be error in fact, that is not confessed by the demurrer, it not being assignable, but the demurrer upon it is in point of law, because not assignable, and the judgment given at St. Martin's was affirmed. This is a judgment pronounced by the highest tribunal of the country: the matter is settled, as I have before observed, by a series of decisions; and the rules in this respect have been perfectly established, and long known and received as law in Westminster Hall. For these reasons the judgment of the Court below must be affirmed. Judgment affirmed.

(a) *Whistler v. Lee*, Cro. Jac. 359, *Plumer v. Webb*, 2 Lord Ray. 1415. And the authorities in *Bac. Abr. tit. Error*.

***HULLETT v. HAGUE. May 5.**

[*370]

A patent was taken out for improvements in evaporating sugar, &c. The specification was as follows:—"My invention consists in a method or apparatus as hereinafter described, by which I am enabled to evaporate liquids and solutions at a low temperature, &c. And my said invention and improvement consists in forcing, by means of bellows, or any other blowing apparatus, atmospheric or any other air, either in a hot or cold state, through the liquid or solution subjected to evaporation; and this I do by means of pipes, whose extremities reach nearly (or within such distance as may be found most suitable under peculiar circumstances) to the upper or interior area of the bottom of the pan or boiler containing such liquid or solution, *the other extremities of such pipes being connected with larger pipes*, which communicate with the bellows or other blowing apparatus which forces the air into them." The lesser pipes were to be equally distributed, and their lower ends on a level with each other. It was further declared, that the form of the apparatus might be varied, provided the essential properties were maintained: Held, that taking the whole of the specification together, it appeared that the invention consisted of the particular method or process of forcing, by means of bellows, &c., air through the liquid subjected to evaporation, viz. *by pipes connected with larger pipes, and placed as mentioned*

in the specification; and, therefore, that it was not void because another patent had been before granted to other persons for effecting the same object, by a coil of pipes (lying at the bottom of a vessel), perforated with small holes, or by a shallow cullender placed at the bottom of the vessel.

THIS was an action for the infringement of a patent, of which the plaintiff was the assignee. Plea, not guilty. At the trial before Lord Tenterden, C. J., at the London sittings after last Hilary term, the plaintiffs produced a patent, dated the 27th of November, 1828, granted to one Kneller, for certain improvements in evaporating sugar (which improvements were also applicable to other purposes), and the following specification:—"I, W. G. Kneller, do declare that my invention consists in a method or process, and certain apparatus as hereinafter described, by which I am enabled to evaporate liquids and solutions at a low temperature, and thereby to avoid the injury to which certain substances which require a nice and delicate application of heat, such as sugar, for instance, are liable by being exposed to too high a temperature; and I do further declare, that my said invention and improvement consists in forcing, by means of bellows, or any other blowing apparatus, atmospheric or any other air, either in a hot or cold state, through the liquid or solution subjected to evaporation, and this I do *371] by means of pipes, whose extremities reach nearly (or within such distance as may be found suitable under peculiar circumstances) to the upper or interior area of the bottom of the pan or boiler containing such liquid or solution, the other extremities of such pipes being connected with larger pipes which communicate with the bellows, or other blowing apparatus, which forces the air into them. The pan or boiler may be of any shape or dimensions, but I prefer it with a flat level bottom, and I introduce the liquid or solution to the depth of from about four to six inches. The heat may be applied to the lower or exterior area of the bottom of such pan or boiler, by naked fire, steam, or hot air in the usual manner, and by means well understood; the air then forced into the heated liquid or solution keeps it in a constant agitation, abstracts its heat, and carries off the steam or vapour, which is to be expelled by raising the degree of heat under the pan or boiler, and increasing the quantity and velocity of the air injected into the liquid or solution; or, on the contrary, by lowering the heat and moderating the injection of air, the evaporation is retarded at the pleasure of the operator." The specification then, after describing at what degree of temperature this might be done, proceeded as follows:—"And I further declare that this my invention may be applied to the evaporation of other liquids as well as sugar, and that the form or construction of the apparatus which I use to produce the above effect may be varied according to circumstances, and the form or position of the pan to which it is to be applied: but two things are essential in its construction; the first of which is, that however numerous the blowing pipes may be, their lower orifices should be distributed *372] as evenly and equally over the whole surface of the bottom of the pan as possible; and, secondly, that a stream of air should issue from the lower end of every one of them at the same time. To insure this latter object it is immaterial, whether the bottom of the pan or boiler be perfectly level, but it is quite necessary that all the lower ends of the blowing tubes should be on a level and parallel to the surface of the fluid to be evaporated, in order that there may not be a higher column of fluid in one tube than in another. The mode of construction necessary to produce these objects may be various, but in order the more distinctly to explain my meaning and my mode of operating, I hereunto subjoin a drawing of the apparatus which I have used, and find to answer the purpose." (The drawing was annexed to the specification.) "The form of this apparatus may be varied, provided its essential properties of the air blowing through all the descending tubes, and their being so disposed as to produce greatly divided and equally distributed currents of air over the whole bottom of the vessel at once, are maintained; because my invention consists in producing rapid evaporation at lower temperature than usual by the means hereinbefore described."

This specification having been read on the part of the plaintiff, the defendant put in another patent, under which he acted, granted to Richard Knight and Rupert Kirk on the 9th of May, 1822, entitled, "a patent for the invention of a process for the more rapid crystallization and for the evaporation of fluids at comparatively low temperatures, by a peculiar mechanical application of air;" and the specification was as follows: "We, the said Richard Knight and Rupert Kirk, do by these presents particularly describe and *ascertain the nature [*373 of our said invention, and in what manner the same is to be performed, as follows; that is to say," (They then stated the inconveniences resulting from the common process of boiling fluids by the too rapid access of heat, and proceeded as follows:) "To obviate this and similar difficulties, and also for the purpose of facilitating the process of evaporation of fluids in general, we declare this our invention to be peculiarly adapted, and we do hereby set forth and describe the means by which we effect the same; *that is to say, we propel a quantity of heated air into the lower part of the vessel containing the liquor, syrup, or fluid, whether in a cold or heated state, and cause such heated air to pass through the whole body of the liquor in finely-divided streams.* The means used by us for heating and applying the air to the fluid are as follow: that is to say, a quantity of air is propelled (by means of a blowing engine, bellows, or other machine used for propelling air) *through a pipe or pipes* (made of lead, copper, iron, or other fit material), into the lower part of the copper pan or vessel containing the heated syrup, liquid, fluid, or other matter to be operated on, *coiled or otherwise shaped and accommodated to the nature or form of the vessel*; the said coil of pipe within and lying at the bottom of the said vessel *being perforated with a number of small holes*; the heated air being thus forcibly driven out in minutely divided currents, passes rapidly through the liquid, and according to the quantity and temperature of the air so passing through the liquid, a greater or less quantity of the liquid will be converted into vapour and carried off with the air. In lieu of the perforated pipe, *a shallow metallic vessel, of the nature of a cullender*, within the boiler, may be connected with the *air pipe; [*374 and the cullender being perforated with small holes, the heated air may be driven through this perforated cullender, or any similar contrivance that may best suit the form of the vessel, or the nature of the fluid or material to be acted upon."

The specification then described how the heat might be applied, and proceeded thus: "We further declare, that our invention consists in the application of currents of heated air, when forced or made to pass through the body of any fluid for the purpose of producing or facilitating evaporation; and we also declare, that the same may be advantageously applied to processes dependent upon the disengagement of aqueous vapour during the evaporation, concentration, and crystallization of various substances when dissolved in fluids, as in the manufacture of sugar, glue, salt, alum, soap, tallow, and similar processes." It was contended by the defendant's counsel that the patent assigned to the plaintiff was void: first, because the assignor claimed, according to his specification, the merit of the same invention for which Knight and Kirk had obtained a patent several years before; the object of both patents being the same, viz. the causing of evaporation by means of streams of atmospheric air introduced in any vessel near the bottom of the liquid; and the means also the same, viz. forcing the air through the liquid by bellows or other blowing machines. Secondly, supposing that the process described in the plaintiff's patent was an improvement on that pointed out in Knight and Kirk's specification, it was said that Kneller should have confined his patent to that improvement only. Lord Tenterden was of opinion that although the object to be effected by the two patents was the same, the means of effecting it were different; *and that the patent granted to Kneller [*375 must be considered as one granted for effecting that object by the particular method described in the specification. A verdict was found for the plaintiff, but liberty reserved to the defendant to move to enter a nonsuit.

Campbell, on a former day in this term, moved accordingly. First, the object -- well as the means of carrying the process into effect are the same in both

patents. By the specification of the first patent, Knight and Kirk declare their invention to consist in propelling a quantity of heated air into the lower part of the vessel containing the fluid, and causing such heated air to pass through the whole body of the liquor in finely divided streams, by means of the perforated coil of pipe or cullender, particularly described, "or any similar contrivance that may best suit the form of the vessel or the nature of the fluid." And the invention is further declared to consist "in the application of currents of heated air, when forced or made to pass through the body of any fluid for the purpose of producing or facilitating evaporation." In like manner, the specification of the second patent (Kneller's) declares that invention to consist "in forcing, by means of bellows or any other blowing apparatus, atmospheric or any other air, either in a hot or cold state, through the liquid subjected to evaporation." This Kneller claims as an original invention, and not as an improvement of a former invention. He then proceeds in a distinct sentence to point out, by way of illustration, one method of effecting his object; "and this I do by means of pipes," &c.; and he gives a description of his apparatus, *376] concluding by stating, that "the form *of this apparatus may be varied provided its essential properties of the air blowing through all the descending tubes, and their being so disposed as to produce greatly divided and equally distributed currents of air over the whole bottom of the vessel at once, are maintained;" because the invention consists in producing rapid evaporation at a lower temperature than usual by the means before described.

In both specifications, therefore, the invention claimed is that of forcing the air through the body of the fluid in finely divided streams, for the purpose of producing or facilitating evaporation. Neither of them can be considered as patents granted only for the particular apparatus described in each, for in each specification the particular apparatus described is only given by way of illustration of the mode of applying the principle of the invention, and is not confined to that particular form of apparatus. Knight and Kirk's specification describes the object as to be effected by the coil of perforated pipe, or cullender, "or any other contrivance that may suit the form of the vessel or the nature of the fluid to be acted upon." And Kneller's specification also, after describing the method of effectuating the invention, states it to be that of forcing air, either in a hot or cold state, through the liquid subjected to evaporation, by means of an arrangement of main pipes and branch pipes, descending or dipping into the fluid. And here, too, the patentee does not confine the invention to that particular system of apparatus, but expressly states that the form of this apparatus may be varied, provided its essential properties are maintained, "because," it goes on to say, "my invention consists in producing rapid evaporation at lower temperatures than usual, *377] by the means *hereinbefore described." Kneller should have stated his invention to consist in having the mains to feed the smaller pipes, and should have described it as an improved method of supplying those smaller pipes (to be introduced into the liquid), for the purpose of producing evaporation. But he has taken out a patent for doing that which might lawfully be done by the patent granted to Knight and Kirk. He has not confined himself by the words, "and this I do by means of pipes," to that particular method there pointed out; he claims, as his invention, the principle of producing evaporation at a low temperature, by forcing, with a blowing apparatus, a stream of air through the liquid.

But assuming that, after the verdict, Kneller's patent must be taken to be an improvement upon the method described in Knight and Kirk's patent, Kneller ought to have taken out his patent for that improvement only. Lord Cochrane *v.* Smethurst, 1 Stark. 205, Bolton *v.* Bull, 2 H. Bl. 463, Bovill *v.* Moore, 2 Marshall, 211, Hill *v.* Thompson, 3 Mer. 629, Campion *v.* Bengor, 3 B. & B. 5.

Lord TENTERDEN, C. J. We will consider this case, and give our judgment on a future day. I cannot forbear saying, that I think a great deal too much critical acumen has been applied to the construction of patents, as if the object was to defeat and not to sustain them.

Cur. adv. vult.

Lord TENTERDEN, C. J., now delivered the judgment of the Court. After

stating the patent granted to Knight and Kirk, and the specification, his Lordship proceeded as follows :—

This was, in substance, an invention of a process for the more rapid crystallization and for the evaporation of fluids at comparatively low [*378 temperatures; this object being effected by means of a coil of pipes lying at the bottom of the vessel, perforated with small holes, and thus operating on the liquid, or by a shallow cullender placed at the bottom of the vessel. It was proved, that a pipe employed and acted upon in the manner described in the specification, viz. by forcing the air at the end of it, would accomplish that object.

The patent on which the plaintiff relied, and for the infringement of which this action was brought, was for certain improvements in evaporating sugar, which improvements were also applicable to other purposes. By the specification, Kneller declares that his invention consists in a method or process, and certain apparatus as thereafter described. He does not claim as his invention the principle, but the apparatus, by which the principle, of causing evaporation is to be carried into effect; for he states that, by his apparatus, he is enabled to evaporate liquids and solutions at a low temperature. It is evident that the object of the two patents is the same. But the mode of effecting that object is different. The specification continues, “and I further declare that my said invention and improvement consists in forcing, by means of bellows or any other blowing apparatus, atmospheric or any other air, either in a hot or cold state, through the liquid or solution subjected to evaporation.” Now it was said, that the words which immediately follow, “and this I do by means of pipes,” constituted a separate and distinct sentence from those which immediately preceded them, and that the patentee had stated his invention in the preceding sentence, and *had claimed the same invention as that described by Knight and Kirk [*379 in their specification. But we think that the words, “and this I do by means of pipes,” &c., must, in conjunction with those which immediately precede them, be taken to form one entire sentence, and that they amount altogether to an allegation on the part of the patentee, that his invention consisted of the method or process of forcing by means of bellows or any other blowing apparatus, hot or cold air through the liquid subjected to evaporation, this being effected by means of pipes placed as directed in the specification. Now the method described in Knight and Kirk’s patent appears to us to be perfectly different. It is either to have a pipe, accommodated to the form of the vessel, or a cullender, placed at the bottom of the vessel. The method described in the plaintiff’s specification is to have a large horizontal tube (near the surface of the liquid), into which there are introduced a number of small perpendicular tubes, descending through the liquid to the bottom of the vessel, and having their lower ends exactly on a level and parallel to the surface of the fluid. The air is then forced by the blowing apparatus from the open end of the large tube to the other end which is closed, and as soon as the large tube is filled the air descends through the smaller tubes to the bottom of the vessel, and bubbles up through the liquid, and the evaporation is thereby kept up constantly and equally in all parts. It appears to us that that is a method or apparatus perfectly distinct from the other, and for that method and apparatus the patent was taken out. We are of opinion therefore, that there should be no rule in this case. Rule refused

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*PHILLIPS v. HEADLAM. May 5.

A ship insured at and from Liverpool to Sierra Leone, arrived off the river Sierra Leone, where there was a regular establishment of pilots, about three o'clock in the evening. The captain hoisted a signal for a pilot; but no pilot having come on board, about ten o'clock at night he attempted to enter the river without one, and in so doing the ship took the ground and was lost. The Judge left it to the jury whether the captain, in entering without a pilot, did what a prudent man ought to have done under the circumstances. The jury were of that opinion, and found for the plaintiff. On motion for a new trial on the ground that the verdict was against evidence, Held, that the underwriters were liable, and would have been so although the captain had been wrong in attempting to enter the port without a pilot; he being a person of competent skill, having used reasonable diligence to obtain a pilot, and having exercised his discretion bona fide under the circumstances.

This was an action upon a policy of insurance at and from Liverpool to the ship's port or ports of discharge in Sierra Leone, and during her stay there, and from thence to her port or ports of discharge in the United Kingdom. At the trial before Bayley, J., at the summer assizes for the county of Lancaster 1829, it appeared that the ship sailed on the voyage insured, and arrived at three o'clock in the evening of the 30th of January off the river Sierra Leone, where there is a regular establishment of pilots; that the captain then hoisted a signal for a pilot, and that at ten o'clock, no pilot having come on board, the captain attempted to enter the river, and in so doing the vessel struck the ground, and was lost. It was proved to be usual for vessels, either coming out of or going into the river, to take a pilot, and the defendant's evidence went to show that it was not necessary or proper for the captain to enter the river without a pilot. Upon this point there was contradictory evidence. Bayley, J., desired the jury to find for the plaintiff, if they thought that the captain, in entering the harbour without a pilot, did what a prudent man ought to have done under the circumstances; otherwise for the defendant. The jury having found for the plaintiff, a rule nisi was obtained for a new trial, on the ground that the verdict was against evidence.

*381] *F. Pollock now showed cause. The question left to the jury was more favourable to the defendant than it ought to have been. For, assuming the captain to have been a man of competent skill, the underwriters are liable for a loss arising immediately from a peril of the sea, though remotely from the negligence or mistake of the captain or crew. *Busk v. The Royal Exchange Assurance Company*, 2 B. & A. 73, *Walker v. Maitland*, 5 B. & A. 171.(a) But here the jury found that the captain acted bona fide, and as a prudent man ought to do under the circumstances, and the evidence fully warranted the finding. (He then commented on the evidence, and observed that there might be circumstances to render it prudent for the captain to enter a port without a pilot where the navigation usually required one, and that it was sufficient in this case that the measure, in his judgment, was necessary and proper.)

Joshua Evans, contra. It is clearly established law, that where there are pilots, and the navigation requires one, a ship going without one is not seaworthy. *Law v. Hollingsworth*, 7 T. R. 160. Lord Kenyon there says, "It is one of the things implied in contracts of this kind (policies of insurance), that there shall be some person on board the ship, apparently qualified to navigate her." That was the case of a ship entering a harbour where a pilot was required, and is therefore in point. Lord Tenterden, in his treatise on the Law of Merchant Ships and Seamen (p. 148), speaking of pilots established at places in this country, says that, in general, the master of a ship engaged in a foreign trade must put a ship under the charge of such a pilot, both in his outward and

*382] homeward voyage, within the limits of every such establishment. Extreme necessity only could justify the entering of a port without a pilot. (He then commented on the evidence, and contended that the proceeding of the captain in this respect was neither necessary or proper.)

Lord TENTERDEN, C. J. The rule for a new trial must be discharged. If the

(a) And see *Bishop v. Pentland*, 7 B. & C. 212.

loss happened even in consequence of the mistake of the master (provided he were a person of competent skill at the time when the policy was effected), the underwriters are chargeable. The case therefore was left to the jury most favourably for the defendant; and at all events he will not be entitled to a new trial, unless it be on the ground that the master was bound by law not to enter the harbour without a pilot. *Law v. Hollingsworth* was the case of a ship homeward bound to the port of London, and which had received a pilot at Orfordness, but dropped him before she reached her moorings in the river Thames; after which, before she was safely moored, an accident happened, and the vessel was sunk. It may be conceded, that a vessel coming out of a harbour must have a pilot, because the captain has it in his power always to procure one; but it seems to me that if the master of a vessel arriving off a port use due diligence to obtain a pilot, he does all that can be required by law. Here the vessel arrived off Sierra Leone about three in the afternoon: the captain hoisted signals for a pilot; and at ten no boat or pilot had come off. It seems to me that, upon the evidence, the master did use due diligence to obtain a pilot, and having so *done, it was competent to him to exercise his discretion, whether it were [*383 better to run the risk of entering the harbour without one, or to wait till the following day for a pilot. Here, acting to the best of his judgment, he attempted to enter the harbour without one, and in so doing the vessel was lost; and I think that the underwriters are liable for a loss happening under these circumstances. By so holding, I think we shall not establish any rule which can operate to the prejudice of the public, assuming, as we do, that the captain was a person of competent skill.

LITTLEDALE, J. It was the duty of the master to use due diligence to procure a pilot; and having done so without effect, it was then competent to him to exercise his discretion, whether it would be better to go into the harbour without one or remain where he was. There may undoubtedly be circumstances which render it more fit to run the risk of entering a port without a pilot, than to remain outside of port. Here there was contradictory evidence as to the propriety of the measure adopted by the captain. But if he was a man of competent skill, and acted *bonâ fide*, though erroneously, in attempting to enter the harbour without a pilot, and the ship was thereby lost, the underwriters are not discharged.

PARKE, J. The rule of law is, that the assured is bound to have the ship seaworthy at the commencement of the risk. He is bound, therefore, to have a sufficient crew, and a master of competent skill and ability to navigate her, at the commencement of the voyage; and if she sail from a port where there is an *establishment of pilots, and the nature of the navigation requires one, [*384 the master must take a pilot on board. So if in the course of her voyage the master arrive in a port or place where a pilot is necessary, and take one on board, he ought not to dismiss him before the necessity has ceased, *Law v. Hollingsworth*, 7 T. R. 160. But if a vessel sails to a port where the establishment is such that it is not always possible to procure the assistance of a pilot before the vessel enters into the difficult part of the navigation, then, as the law compels no one to perform impossibilities, all that it can require in such a case is, that the master use all reasonable efforts to obtain one. If such efforts are used and fail of success, I do not think it material that in the exercise of his discretion in the navigation of the ship, in the absence of a pilot, the master afterwards commits an error by which a loss is incurred, any more than if he does so in any other part of the voyage, always supposing that he is a person of competent skill and ability. In this respect the case falls within the principle of the decisions in *Busk v. The Royal Exchange Assurance Company*, 2 B. & A. 73, and *Walker v. Maitland*, 5 B. & A. 171. In another action on this policy, tried before me at Lancaster, at the Spring assizes 1830, I left two questions to the jury; first, whether, by the law or usage of Sierra Leone, a pilot was required? and, secondly, whether the captain made all reasonable efforts to obtain one, and not being able to do so, conducted himself as a man of reasona-

ble prudence, care, and skill, ought to have done? The jury found a verdict for the plaintiff, which the Court, on a motion for a rule nisi for a new trial, refused to disturb. *385] I was by no means satisfied that, in leaving the latter part of the second question to the jury, I did not put the case more favourably than I should have done for the defendant; and upon subsequent reflection I was satisfied that I did, for the reasons I have before stated. In the present case, also, it seems to me that the question was left too favourably for the defendant; but at all events there was evidence on both sides, and the jury having decided upon that evidence, I think the verdict ought not to be disturbed.

Rule discharged (a)

(a) PATTERSON, J., having been counsel in the cause, gave no opinion.

DE LA CHAUMETTE v. The Bank of ENGLAND. *May 6.(a)*

A promissory note payable to the bearer, made in England; is by the statute of 3 & 4 Anne, c. 9, transferable by delivery in a foreign country.

TROVER for a bank note. Plea, not guilty. At the trial before Lord Tenterden, C. J., at the London sittings after Michaelmas term 1829, the jury found a special verdict, setting out the following facts:—One George Haselton, on the 28th of February, 1826, was lawfully possessed of the bank note in the declaration mentioned; and whilst he was so possessed thereof, some person or person to the jurors unknown, on the day and year last aforesaid, feloniously stole, took, and carried away the same from the said George Haselton. The said Bank of England note afterwards was in the hands of M. Emerigue, a money changer of respectability, and of great business at Paris, in the kingdom *386] of France. Messrs. Odier and *Co., bankers at Paris, being desirous of making a remittance of English money from Paris to the plaintiff, L. A. De la Chaumette (who then resided and carried on the trade of a merchant in London, and to whom Odier and Co. were then indebted in respect of transactions in business between them, in the sum of 1700*l.*) afterwards, on the 21st day of May, 1827, purchased from the said M. Emerigue for that purpose, among other English money, the said bank note, in the usual course of business, and for a valuable consideration, computed at the then rate of exchange between Paris and London. Odier and Co. afterwards, on the 22d day of May in the same year, in the regular course of business, remitted, on the general account, the sum of 1008*l.* in English money and bank notes, whereof the bank note, so purchased as aforesaid, was one, from Paris to L. A. De la Chaumette, then being in London, who received into possession the last-mentioned Bank of England note, and retained the same in his possession from thence continually, until and at the time of the conversion and disposal of the same, hereafter mentioned. At the respective times of the aforesaid purchase and remittance it was the practice for persons travelling from this country into France to take, for the purpose of paying their expenses, bank notes; and for persons residing or domiciled in France to receive the same in payment. At the respective times of the aforesaid purchase and remittance, it was also the usual practice in Paris for bankers or other persons to make remittances from Paris to persons residing in England, in English money and bank notes; and for the purpose of making such remittances, to purchase of the money changers in Paris, at the rate of *387] exchange between Paris and London for *the time being, English money and bank notes. After the bank note in the declaration mentioned had been so remitted as aforesaid, and the said L. A. De la Chaumette had thereupon become possessed of the same in manner aforesaid, the said governor and

(a) See the former case between the same parties, 9 B. & C. 208.

company, at the request and instance of the said George Haselton, converted and disposed of the same to their own use.

The case was now argued by

Platt for the plaintiff. The general rule as to a bill or note assignable by delivery, and lost by theft or accident, is, that the thief or finder may confer a title by transferring it (though if it be assignable by endorsement he cannot); *Miller v. Race*, 1 Burr. 452, *Grant v. Vaughan*, 3 Burr. 1516, *Peacock v. Rhodes*, Doug. 611: and the transferee has a good title to it, provided it came into his possession bona fide, and for a valuable consideration. Here it is found that *Odier and Co.* took the promissory note in the ordinary course of transfer. [PARKE, J. It is not found that the promissory note was transferred in France.] That is not disputed. (He was then stopped by the Court.)

Follett, contra. The rule relied upon applies to negotiable instruments. If this was a negotiable instrument in France, and the plaintiff gave value for it, he might sue on it, notwithstanding the fact of its having been stolen. If it was not a negotiable instrument there, but a mere chattel or security, like a bond or note not negotiable, no property passed by the delivery, but it remains in Haselton, from whom it was stolen, because the property in such *a chattel is not altered, except by sale in market overt. Now a promissory [*388 note is not negotiable by the custom of merchants, but was made so in this country by the statute 3 & 4 Anne, c. 9. The question here is not, whether that statute applies to render notes made in a foreign country transferable in England when endorsed in this country, as in *Milne v. Graham*, 1 B. & C. 192, *Bentley v. Northouse*, 1 M. & M. 66, but whether a promissory note made in this country and endorsed or delivered abroad passes by such endorsement or delivery. Before the statute of Anne, a promissory note was only evidence of a debt, and not a negotiable security, *Buller v. Cripps*, 6 Mod. 29. It was not transferable by endorsement or delivery. The preamble of the statute of Anne shows that was the state of the law. That statute makes promissory notes negotiable in England, in the same manner as inland bills of exchange. It therefore makes them transferable by endorsement in England; but in France, or any other country, a promissory note would continue what it was before the statute, a mere chattel. In *Carr v. Shaw*, B. R. H. 39 G. 3, *Bayley on Bills*, 5th ed., p. 26, the Court intimated a strong opinion that the statute did not apply to foreign bills. In *Milne v. Graham*, and in *Bentley v. Northouse*, a foreign note was held to be negotiable in England by endorsement, because the statute made all promissory notes transferable in England. But the act did not, and could not, make them transferable in a foreign country. It is not found what the law of France is; and in the absence of proof to the contrary, which the plaintiff ought to have given, it may be assumed that the law of France does not authorize *the transfer of a promissory note by endorsement or delivery. [*389

Lord TENTERDEN, C. J. An inland bill of exchange was transferable here before the statute of Anne, by the custom of merchants, which was part of the common law introduced into this country, in consequence of the practice in other countries. If an inland bill of exchange, drawn and accepted in England, gets to Paris, it is undoubtedly negotiable there by the custom of merchants; and if so, what is the effect of the statute of Anne as to promissory notes? It expressly recites, that it was passed to the intent to encourage trade and commerce, which would be much advanced, if such notes should have the same effect as inland bills of exchange, and should be negotiated in like manner. The object clearly was to make promissory notes negotiable like English bills. If, therefore, English bills of exchange were negotiable when abroad, these notes ought to be so likewise, in order to satisfy the intention of the legislature; and I find nothing in the enacting part of the statute to restrain their negotiability to England. A note payable to bearer, therefore, is transferable abroad just as an English bill of exchange drawn in England, and remitted to a foreign country, would be. It may be true that great injury has been suffered of late by the facility enjoyed of sending stolen notes abroad; but, on the other hand, the negotiability of English

notes in foreign countries is a great convenience, as it saves the necessity of carrying abroad specie. The judgment of the Court must be for the plaintiff.

*390] **LITTLEDALE, J.** The statute makes promissory notes transferable in the same manner as inland bills of exchange; and it seems to me, therefore, that it makes them transferable in a foreign country in the same manner as inland bills undoubtedly are by the custom of merchants. It follows that, since the statute, a note made in England, assignable by delivery, will pass as currency abroad as well as here.

PARKE, J. The question is whether the plaintiff had the legal interest in this promissory note? and I have not the least doubt that he had by the express words of the statute of Anne. That statute enacts, that all notes in writing, whereby any person promises to pay to any other person or persons, his, her, or their order, or unto *bearer*, any sum of money mentioned in such note, shall be construed to be by virtue thereof due and payable to any such person to whom the same is made payable, and also every such note shall be assignable or endorsable over in the same manner as inland bills of exchange are or may be, according to the custom of merchants. Here, therefore, whoever was the bearer of the note may sue, unless it be shown that the note was not obtained *bonâ fide*, and for valuable consideration. It was so obtained here, and it comes, therefore, within the express words of the statute. A holder of an inland bill, endorsed to him in France, would undoubtedly be entitled to recover on it. If the effect of the statute were to make promissory notes transferable in England only, the circulation of such notes as this would be much impeded, for the property in a bank note (remitted to a foreign country) would always remain in that person
*391] who was the last bearer in England; and *it might be extremely difficult to say who he was. I think that this note was transferable in France by delivery; and it is very beneficial to the Bank that that should be so; for it is their interest that their notes should have the most extensive circulation.

PATTESON, J. The question between the parties is reduced to this, whether a note made in England can be transferred in a foreign country? There is no limitation in this respect by the statute of Anne, for notes are made transferable in the same manner as inland bills of exchange. And as an inland bill of exchange (remitted to a foreign country) would be negotiable by the custom of merchants, it follows that promissory notes are so by the statute.

Judgment for the plaintiff.(a)

(a) See *Brown v. Harraden*, 4 T. R. 148.

The KING v. The Justices of PEMBROKESHIRE. May 7.

When the sessions on determining an appeal have granted a case, but none has been stated, the Court will, under some circumstances, direct a mandamus to the justices who heard the appeal, to state a case.

But not where it is clear that such a proceeding could lead to no result; as where the chairman, in consequence of his own opinion and that of the Court upon the facts, refused to sign any statement but one which would have excluded the point of law relied upon by the party demanding a case.

CAMPBELL had obtained a rule nisi for a mandamus to the justices of Pembrokeshire to state a special case for the opinion of this Court, pursuant to an order of sessions made on hearing an appeal against an order of removal from Narberth to Llanbody, and to return the case so stated into this Court. It
*392] appeared by the affidavits in support of the rule, that the appeal *came on to be tried at the Midsummer quarter sessions for Pembrokeshire, in 1830, when, after hearing contradictory evidence on behalf of the two parties on a question of settlement by renting a tenement, the Court confirmed the order; but, being requested to grant a case, did so in general terms, and with-

out reference to any specific point. The attorneys could not agree in drawing up a case; and, upon their waiting on the chairman in order that he might settle the statements they had prepared, he said he could not sign any case by which it should not appear that the Court had decided in favour of the respondents on the facts, independent of the law. The appellants' attorney declined taking a case so stated.

John Evans now showed cause; and it appeared by the affidavits against the rule, that the question of law which the appellants wished to bring before this Court regarded the effect of a supposed agreement between the pauper and the landlord of the tenement, that certain repairs to be done by the pauper (and which it was alleged he had afterwards done) should be allowed in lieu of rent: but it seemed that the justices at sessions, although they granted the case, had been of opinion, upon the evidence, that the agreement had not been made, nor the repairs done; and the chairman would not sign any statement to a different effect.

Lord TENTERDEN, C. J. The justices have confirmed the order, subject to a case. That is no confirmation, unless a case be stated. All we can do, under the circumstances, is to require them to enter continuances, and hear the appeal. I do not see how we can order them to state a case.

*The rest of the Court concurred.

[*393]

Rule discharged.

On a subsequent day in the term, *Campbell* mentioned to the Court a case, *The King v. The Earl of Effingham and Others* (determined in Hilary term 1782), of which he had obtained a note taken by the late Mr. Dealtry, and in which the Court granted a mandamus to the justices present at the last Bradford (West Riding of Yorkshire) sessions, to state a case.

Lord TENTERDEN, C. J. I admit that there may be instances in which such a mandamus may issue; but not that it ought to go upon the present application. Here the case, if stated, could come to nothing. The facts are for the judgment of the sessions; and, under the circumstances disclosed, it would evidently be useless to call upon them for a case. (a)

(a) The reporters have been favoured by Mr. Dealtry with a copy of the note above referred to, which is in substance as follows:—

The KING v. the Right Hon. the Earl of EFFINGHAM and Others. (Michaelmas Term, 1781.)

Motion by *J. P. Heywood* for a mandamus to the Earl of Effingham, Henry Wickham, Esquire, Henry Wood, D. D., Henry Zouch, clerk, Pemberton Milnes, Esquire, Sir Watts Horton, Bart., and Joshua Horton, Esquire, justices, &c., for the West Riding of Yorkshire, commanding them to state a special case on an appeal between the inhabitants of Northowram and the inhabitants of Hipperholme, determined by them at sessions, 13th of July last: on affidavit that, the order being affirmed, the appellants desired a special case to be stated, which the sessions unanimously consented to; and Mr. *Heywood*, counsel for the appellants, drew the case; and in the afternoon both counsel tendered the case to the sessions for their approbation. Mr. Wickham and Mr. Horton, who joined in making the original order, and Sir Watts Horton, who had an estate in each parish, and therefore declined giving any opinion in the morning, were the only justices remaining, when Sir W. H. refused to permit the case to be stated; and he being joined by Mr. Horton, no case was stated.

*Lord MANSFIELD doubted whether a mandamus could go to compel justices to state a case; but Mr. J. BULLER saying, that in this instance the court of quarter sessions had actually agreed to state one, but Sir W. H. prevented it, a rule nisi was granted. Hilary term, 1782. [*394]

Mr. *Fearnley*, and Mr. *Dunning* showed cause, on affidavits, in which it was represented that the case had not been regularly granted, but that some of the justices had said a case might be stated if counsel could agree upon one; that counsel had not agreed, and that no directions for a case had been given to the clerk of the peace. *The Attorney-General*, and Mr. *Heywood*, in reply, said, that the case had been properly granted, and that the justices were willing that it should be stated; and the *Attorney-General* mentioned that an instance had occurred in which a mandamus had been granted, when the respondents would not consent to the stating of a case.

Lord MANSFIELD ordered the case annexed to the affidavits in support of the rule to be read; and, it being read, asked Mr. *Fearnley* what facts in the case he could controvert? Mr. *Fearnley* said he had not seen the case at the sessions, and was not prepared now to go into the truth of the facts. Mr. *Heywood* observed, that though the case was annexed to Mr. Parker's affidavit, none of the justices showing cause had denied any fact in it. Lord MANSFIELD said there had been a

misunderstanding; there did not seem to be any contrariety of facts, and the mandamus must go. Mr. *Fearnley* asked whether the justices must re-examine the witnesses?

Lord MANSFIELD. They must do it in order to know what case to return, if there is a difference about the facts.

In Easter term 1782, a return was made, stating a special case, and stating also that the sessions had discharged the order of two justices; and Mr. *Heywood* obtained a rule nisi for affirming this last-mentioned order of sessions; which rule was afterwards made absolute, no cause being shown.

*395] *ALDRIDGE v. HAINES and Seven Others. May 9.

In an action of trespass against commissioners of a court of request and their officer for taking goods, the defendants justified, alleging, that at the court holden by them pursuant to statute, the plaintiff committed a contempt, and thereupon the defendants who were commissioners imposed a fine upon him, and issued their warrant to the other defendant, the officer, to levy it, by virtue of which he seized, &c. It was proved that the commissioners were acting in their jurisdiction, that a conviction and warrant produced were signed by them, and that the other defendant was their officer; and in proof of the contempt and proceedings thereupon, the conviction of the plaintiff, and the warrant to levy the fine were put in: Held, that although the pleas stated as a substantive fact that the plaintiff had been guilty of a contempt, and not merely that he had been convicted, the fact of contempt could not be inquired into; for the allegation of it might be rejected as unnecessary, and the conviction and warrant were pleaded, and these, appearing to have issued from a competent jurisdiction, were conclusive of the facts stated in them.

The act empowered the commissioners to fine any person who should contemptuously and wilfully insult or abuse them. One of the pleas stated, that the plaintiff contemptuously, &c., insulted the commissioners by accusing them of injustice; the conviction stated this in similar terms, but added, "and by calling Mr. G. S., who was then attending in the court, an infamous liar:" Held, no variance, as the latter statement might be rejected.

The statute provided, that it should be lawful for the serjeant, by order of the court, to apprehend the person guilty of contempt, and that the court should then proceed to fine, &c. The conviction merely stated that the plaintiff was apprehended; but it appearing by the narrative that the apprehension must have been in presence of the commissioners, who afterwards proceeded to fine: Held, that their order might be inferred.

The court was, by the statute, to be holden only on Tuesdays. The warrant was headed as if made at a court holden on that day, when the fine was in fact imposed; but it purported to be signed and sealed on the next day: Held, no objection.

TRESPASS for seizing, taking away, and converting the plaintiff's goods. Pleas,—first, not guilty; secondly, that seven of the defendants (not including Haines) were commissioners for the recovery of small debts within the hundreds of Westbury, Warminster, Heytesbury, and Damerham South, in the county of Wilts, acting under a statute of 48 G. 3; and that they, being such commissioners, and having taken the oath prescribed by the act, and being duly qualified under the same, before the times when, &c., to wit, on the 23d of September, 1828, duly met and held the said court of requests at Warminster, for the purposes of the act; at which court the plaintiff, being present, did then and there, before the times when, &c., in open court contemptuously and wilfully insult the

*396] said seven defendants, being such commissioners, and sitting in open *court as aforesaid, by accusing them of injustice, hatred, malice, and corruption in their proceedings in the said court; and thereupon the defendant Haines, being serjeant of the court, duly appointed under the act, by order of the other defendants, being such commissioners, and holding such court as aforesaid, took the plaintiff into custody; and the other defendants, being, &c., and holding such court, did then and there, from their own view and knowledge of what passed, examine into the said insult of the plaintiff, and after such examination thereof, to wit, on the day and year aforesaid, at Warminster aforesaid, duly imposed a certain fine (to wit, of 10*l.*) upon the plaintiff for his said offence, whereof he then and there had due notice, and was duly requested forthwith to pay such fine; that the plaintiff did not pay the same, and thereupon the seven first-mentioned defendants, being commissioners, &c., on the day and year aforesaid, at Warminster, duly made and issued their warrant in writing under their hands and seals, directed to Haines, so being such serjeant, &c., and thereby ordered him to levy the fine, with costs, by distress and sale of the plaintiff's

goods, rendering the overplus, if any, to him, and to make due return thereof at the then next court to be holden at Warminster; that the warrant afterwards, and before the times when, &c., to wit, on the said 23d of September, at Warminster, was duly delivered by the said seven defendants to Haines, then being such serjeant, to be executed; by virtue of which warrant he, being such serjeant, seized and detained the goods as a distress for the fine. The third plea was similar, except in stating that the plaintiff insulted and abused J. B., one of the commissioners, by saying of him in open court, that he came to [*397] *uphold the corruption and injustice there practised. The replication to the special pleas was de injuriâ. At the trial, before Gaselee, J., at the Wiltshire Spring assizes, 1829, a verdict was found for the plaintiff against all the defendants, with 10*l.* damages, subject to the opinion of this Court on the following case:—

The alleged acts of trespass were admitted at the trial; and in justification of them, the defendant's counsel produced from the crown office the following document, which had been returned to this Court in Michaelmas term 1828, in pursuance of a certiorari obtained by the plaintiff:—

“Be it remembered, that on this 23d day of September, 1828, and in the ninth year of the reign of our sovereign lord George the Fourth, &c., at the court of requests for the hundreds of Westbury, Warminster, &c., in the county of Wilts, holden at the London Inn at Warminster, on Tuesday, the 23d day of September, 1828, Richard Aldridge having been taken into custody by the serjeant of the same court before us Thomas Down,” &c. (the seven defendants first above-mentioned), “being seven of the commissioners for the recovery of small debts within the said hundreds of Westbury, &c., and the commissioners present at the said court or meeting, for having on the day above mentioned, and during their sitting in the said court, contemptuously and wilfully insulted and abused us the said commissioners being then present and sitting in the said court, by accusing us the said commissioners of injustice, hatred, malice, and corruption in our proceedings in the said court, and by calling Mr. George Strode, who was then attending in the said court, an infamous liar, &c. We, the said Thomas Down, &c., being such commissioners as *aforesaid, having from our own [*398] view and knowledge of what then passed, examined into such insult, abuse, and misbehaviour, do convict the said R. A. of the said offence, and do impose a fine of 10*l.* upon the said R. A. for his said offence; and do hereby order and adjudge him to forfeit and forthwith pay the said fine of 10*l.* for his said offence, such offence being contrary to the provisions of an act made in the forty-eighth year of the reign of his late majesty king George the Third, intituled ‘An Act for the more easy and speedy recovery of small debts within the hundreds of Westbury,’ &c. And we do adjudge such fine of 10*l.* to be paid by the said R. A. to us the said commissioners, to be distributed by us among the poor of the said parish of Warminster, in the county aforesaid, where the said offence was committed, pursuant to the said act. Given under our hands and seals the day and year aforesaid.” (Signed and sealed by the seven commissioners.)

The following warrant was also produced from the same custody. The statute 48 G. 3, c. lxxxviii., therein referred to, was to be taken as part of the case:—

“The court of requests for the hundreds of Westbury, Warminster, &c., held at the London Inn in Warminster, on Tuesday, the 23d day of September, 1828. Whereas by an act of parliament made and passed in the forty-eighth year, &c., intituled, &c., it was amongst other things enacted, ‘That if any person or persons shall contemptuously and wilfully insult or abuse all, any, or either of the said commissioners, or any or either of the officers of the said court for the time being during his or their sitting or attendance in the said court, or going to or from the said court, or shall interrupt or obstruct the proceedings of the said court, then and in every *such case it shall [*399] and may be lawful to and for the serjeant or serjeants of the said court, with or without the assistance of any other person or persons, by the order of the said commissioners, to take such offender or offenders into custody, and

the said commissioners shall then examine into such insult, abuse, or misbehaviour, either from their own view or knowledge of what passed, or by the oath or oaths of one or more credible witness or witnesses; and upon such insult, abuse, or misbehaviour being duly proved as aforesaid, it shall and may be lawful to and for the said commissioners, and they are hereby authorized and empowered to impose a fine not exceeding 10*l.* for each and every such offence, on each and every such offender or offenders; and in case such fine shall not be forthwith paid, such fine shall and may be levied and recovered by distress and sale of the goods and chattels of such offender or offenders, by warrant under the hands and seals of any three or more of the said commissioners.''' (The remaining part of the clause directed the application of the sum to be levied, and gave power to imprison in default of sufficient distress.)

“ And whereas at the court held in pursuance of the said recited act on the day and at the place above mentioned, Richard Aldridge, of Warminster aforesaid, gentleman, being then present in the said court, did contemptuously and wilfully insult and abuse the said commissioners then sitting in the said court; and the said commissioners from their own view and knowledge of what passed did, in pursuance of the directions of the said act, and the powers thereby in them vested, unanimously impose a fine of 10*l.* on the said R. A. for such insult, *400] abuse, and misbehaviour, but which fine was not *forthwith paid by the said R. A. We, therefore, whose names are hereto subscribed and seals affixed, being seven of the commissioners acting under and by virtue of the said recited act, do by this our warrant order and require you to levy, by distress and sale of the goods and chattels of the said R. A., the sum of 10*l.*, being the amount of the fine so imposed on him as aforesaid, together with the costs and charges attending such distress and sale, and to render the overplus, if any, after deducting such fine, and the costs and charges of such distress and sale, to the said R. A., and make due return hereof at the next court to be holden at the London Inn, in Warminster aforesaid. Hereof fail not. Given under our hands and seals, 24th day of September, 1828, to Samuel Haines, serjeant of the said court, to execute.” (Signed and sealed by the same seven commissioners.)

It was proved by the clerk of the court that the signatures were in the handwriting of the parties; that they were, and were acting and attending on the court as, commissioners on the 23d of September, 1828; that Haines was then serjeant; and that the plaintiff attended the court on that day to demand a rehearing of a case in which he was interested. The evidence rested here, it being urged by the defendant's counsel, on an attempt made by the other side to cross-examine as to the circumstances leading to the imposition of the fine, that the conviction already offered in evidence was conclusive as to the facts therein stated.

The act directs, (sect. 10) that the commissioners shall enter in a book all their judgments, acts, orders, proceedings, &c., relative to the execution of the powers vested in them by the statute, and the names of the commissioners present *401] at the respective meetings, such entries to *be signed by the chairman of each meeting; and that such entries, when so signed, shall be allowed to be read in evidence in all courts in proof of the proceedings. It appeared that such a book of proceedings was kept; but it was not produced at the trial.

The case was argued in the present term, by

Barstow for the plaintiff. The question will be, first, whether the documents produced at the trial are conclusive of the facts therein stated; and, secondly, whether, if they are so, they support the pleas. It is an established rule, that nothing shall be intended to be out of the jurisdiction of a superior court but that which specially appears to be so, or anything within the jurisdiction of an inferior court but that which is so expressly alleged, *Peacock v. Bell*, 1 Saund. 46. Now, as to the first question, it is not proved by the document given in evidence and called a conviction, that any conviction really took place. No analogy can be drawn from the case of adjudications by justices of the peace; these commissioners are not properly magistrates, and have no general authority

to convict, but only a limited power in certain cases. And even supposing the analogy to exist, still, where a conviction by magistrates is offered in evidence, the opposite party may traverse two facts: that the magistrates had jurisdiction in the particular case, and that they did actually convict. Lord Kenyon appears to allow this in *Rex v. Barker*, 1 East, 185, where he says that justices may return their convictions in a more formal shape than that in which they are originally drawn up, "provided the facts will warrant *them in stating what they do." In that case the facts which gave jurisdiction were not [*402 disputed, nor the fact of the conviction itself. Here both are in issue. If the circumstances giving jurisdiction were clear, and the conviction itself unquestioned, it may be admitted that the document would then be evidence of the facts leading to conviction. Again, in *Massy v. Johnson*, 12 East, 67, it was taken for granted that the fact of conviction might be disputed, but the Court would not allow it to be tried on affidavits. In *Gray v. Cookson*, 16 East, 13, it does not seem to have been disputed that the conviction was traversable; the conviction itself did not come in question there; the Court only said that in a collateral proceeding, and where it was not directly impeached, they would give credit to it as having been made at the time of which it bore date. If, therefore, the present document could be considered in the light of a conviction by magistrates, it would not necessarily be conclusive. But these commissioners have merely an authority limited in point of time and place, and to be exercised according to certain regulations. Magistrates make a minute of their convictions, and return them, if necessary, to the sessions; but these persons are required to enter their judgments and other proceedings in a book, to be signed by the chairman, and that is the proper evidence of what they do in execution of the act. The form of conviction given by the local statute (and against which there is no appeal) does not contain any complete statement of the facts necessary to give jurisdiction; it may be inferred, therefore, that that defect was to be supplied by a regular and full entry in the *book, subscribed by the chair- [*403 man; which entry ought to have appeared at the trial.

Supposing, however, in the second place, that the conviction, if it be such, and the warrant in this case, are conclusive of the facts stated in them, that statement does not bear out the pleas. 1. It is not shown by the conviction that the offence was examined into, or the adjudication made, in the plaintiff's presence, or while he was in court, or at the court at which the contempt happened. It ought distinctly to appear that the party convicted was present while the offence was examined into, *Rex v. Selway*, 2 Chit. 522. After stating the offence by way of recital, the commissioners proceed to say "we do convict," &c., but the document is not entitled, nor does it otherwise appear to have been executed, at the said court. The act evidently requires the fine to be imposed immediately on the commission of the offence. 2. The warrant, though entitled as if made at the court held on the 23d of September, is given under the hands of the commissioners on the 24th, a different day, and not the day of the week (Tuesday) on which the statute empowers and requires them to hold the court. And the warrant does not show that the plaintiff was taken into custody before the court proceeded to examine. Nor does it describe the offence with sufficient particularity. 3. Several facts, which were properly introduced in the pleas, are not proved by the conviction and warrant, and no other evidence was given of them. It is pleaded that the plaintiff, before examination, was taken into custody (as the act requires) *by order of the Court*. No such *order appears by the [*404 conviction or warrant. The act limits the sittings of the court to certain hours. It does not appear (nor indeed is it pleaded) that the sittings in question were within those hours; and the limits of a jurisdiction in point of time are as material as in point of place. Nothing is to be intended in favour of an inferior jurisdiction with respect to either. It was not properly proved that on the day in question the court was held by the number of commissioners required by the act; namely, three at least, in some cases, and five in others. The only legal evidence of this is the book, in which the act requires the names to be entered at

each meeting It is pleaded that the plaintiff had notice of the fine and was requested to pay. There was no proof of either fact. [PARKE, J. If he was in court at the time of the adjudication he must have had notice. LITLEDALE, J. He appears by the conviction to have been taken into custody at the time; he must, therefore, be considered as having been present.] Not necessarily at the adjudication. And there appears no request of payment. It is pleaded that the warrant was delivered to Haines as serjeant of the court, before the seizure. There is no proof of this. The contempt as stated in the conviction varies totally from that alleged in the third plea; it corresponds indeed with that stated in the second plea, as to accusing the commissioners of injustice (which, however, in a conviction, is too general a statement of the offence, Paley on Convictions, p. 26, 2d ed.(a)); but the conviction adds another contempt, namely, the *405] abuse directed at a Mr. Strode (not one of the *commissioners), which might equally or solely have been the ground of proceeding against the plaintiff, and which is not noticed in the pleadings. [PARKE, J. That part of the conviction may be rejected as insensible. Speaking abusive words of Strode was not properly insulting or abusing the commissioners; though the plaintiff might have been convicted of it as an obstruction or interruption of the proceedings. Lord TENTERDEN, C. J. The conviction must be taken as applying to that part of the conduct stated which might properly be the subject of conviction.]

Coleridge, contra. The question is, whether the documents were evidence, not of all the facts in the case, but of the facts stated in them; if they were, the pleas are fully supported. It was proved by other evidence than that of the conviction and warrant, that the commissioners were acting within their jurisdiction; and that being so, the facts stated in those documents are not traversable. *Strickland v. Ward*, 7 T. R. 653, note (a), *Brittain v. Kinnaird*, 1 B. & B. 432, and *Basten v. Carew*, 3 B. & C. 649 (among other cases), establish that a conviction or record of proceedings by a magistrate having jurisdiction of the subject-matter, is conclusive of the facts set out in it, in an action against such magistrate. Those were cases of justices of the peace, but the principle is not limited to convictions by them; it was applied to an adjudication by the censors of the college of physicians, in *Dr. Groenvelt v. Dr. Burwell*, 1 Ld. Raym. 454, and to judgments of commissioners of excise, in *Fuller v. Fotch*, *406] *Carth.* 346, and *Terry v. Huntington*, Hardr. 480. *Several cases are cited in illustration of this principle by Holt, C. J., in *Dr. Groenvelt's* case, and particularly *Terry v. Huntington*, where commissioners of excise adjudged low wines to be strong waters, and it was held that an action lay against the officer executing their warrant, because they had exceeded their jurisdiction, no duty being imposed upon low wines. He also puts the case of two justices adjudging A. to be the father of a bastard, where, if the child be a bastard, their judgment is conclusive as to the fact of A. being the father; but not so if the child was born in wedlock, for then the judgment was *coram non judice*, and void. He cites *Hammond v. Howell*, 1 Mod. 184, 2 Mod. 218, where a jurymen who had been fined for acquitting Penn and Mead, brought an action against the recorder for imposing the fine; and although the fine had been held illegal in the Common Pleas, yet it was decided that this action did not lie, as the defendant, when he imposed the fine, was in the commission of oyer and terminer, and a judge of record. In the present case the defendants, at the time of making their adjudication, were sitting as commissioners under the act; their conviction, or whatever name may be given to it, is a judicial statement by them of acts which they did as judges by virtue of their commission; and, therefore, none of the statements in it can be traversed.

Then as to the objections which are supposed still to remain, assuming the conviction and warrant to be conclusive. It is said that the examination into the offence, and adjudication upon it, are not stated in the conviction to have been

(a) See *Rex v. Sparling*, 1 Stra. 497, and other authorities cited, Paley, p. 96.

made immediately, or in the *plaintiff's presence. But enough appears from which this may be presumed, and therefore the formal allegation is [*407 unnecessary, *Rex v. Aiken*, 3 Burr. 1785, *Rex v. Kempson*, Cowp. 241, *Rex v. Thompson*, 1 T R. 18.(a) The adjudication is in the present tense, and the whole narrative by its construction evidently relates to the same time. And, in point of fact, the party is taken into custody for the contempt, at the Court, and they proceed upon their own view of what passed. As to the warrant being issued on Wednesday, it appears by the date at the commencement to have been framed at the Court on the day before, and if the minute was regularly made on that day, there is no ground for saying that the warrant might not be signed and sealed, if by a proper number of commissioners, at a subsequent time. It is objected that by the statute, the person guilty of contempt is to be taken into custody by order of the Court and *then* examined; and that no apprehension by order of the Court is shown in this case. But it is averred in the conviction that the plaintiff was taken by the serjeant before the Court, and that they (immediately, as it appears) proceeded to examine. Their order must, therefore, be inferred. At least they ratify the officer's act. As to the hours within which the Court was sitting, it is not too much to intend that they were the regular ones, when it is alleged that the commissioners were sitting on a day pointed out by the statute, and (as the warrant states) acting under and by virtue of the act. It is contended that the holding of the Court by a competent number of commissioners *ought to have been proved from the book of [*408 proceedings. But that is no objection, if the instruments in question are regular and properly signed. These are merely part of the proceedings of the day: the entry of names has no reference to these in particular, but would be found in the book at the commencement of the whole transactions of the day; and if the clerk had omitted to enter the names as it was his duty to do, it cannot be contended that these acts of the Court would, by reason of such neglect, be held invalid in an action of trespass. It is true there is no proof that the plaintiff was requested to pay the fine; but there was no need to allege or prove this fact. The statute does not require it. Nor was it necessary to state or prove when the warrant was delivered to the officer. As to the supposed variance in describing the contempt, the substance of the offence was insulting and abusing the commissioners; all that is stated beyond this is merely matter of evidence: and it will be presumed that the fine was imposed for that part of the offence stated to which the judgment was legally applicable. [PARKE, J. You have in these pleas alleged the contempt as a fact. Would not the proper mode have been to state that, the plaintiff being in custody before the commissioners by their order, at a court, they adjudged him guilty of the contempt, and issued their warrant? The question is, Whether, by the present mode of pleading, you do not let in an inquiry into the facts. The true ground on which a conviction is held conclusive is, not that it is evidence of the facts stated, but that it is a bar to inquiry, the magistrate having exercised his jurisdiction in a case of which he was the *competent judge.] In *Dr. Groenvelt's case*, [*409 1 Ld. Raym. 454, all the matters upon which the conviction was grounded were pleaded as substantive facts, and Holt, C. J., held, that the defendants having entitled themselves to jurisdiction (which was admitted on the pleadings), then, whether the matter of fact were such as they adjudged it or not, was not traversable, but the plaintiff was concluded, and could not falsify the judgment. Here the plaintiffs have shown by extrinsic evidence that they were acting within their jurisdiction; and then the conviction and warrant supply proof which cannot be contested, of all the other facts necessary to the justification.

Cur. adv. vult.

Lord TENTERDEN, C. J., now delivered the judgment of the Court. After reading the section of the act upon which the adjudication was grounded, and the material parts of the pleadings, his Lordship proceeded as follows:—One question, and the most difficult in this case was, whether, as the plea alleged a

(a) See as to this case, *Rex v. Stone*, 1 East, 648, n. (a).

contempt in fact committed by the plaintiff, and not merely a conviction of such offence, the plaintiff might not insist on going into an inquiry as to the fact of contempt, notwithstanding the conviction. We think, however, that he could not; that the allegation of the offence having been in fact committed was unnecessary in these pleadings, enough being shown without it to furnish an answer to the action; that credit must be given to the conviction and warrant, issuing, as they do, from a competent jurisdiction; and, consequently, that the justification is supported.

*410] Several objections were made to the conviction and warrant as not bearing out the pleas; but we think they cannot prevail. One defect relied upon was, that it did not appear by these documents, whether or not the plaintiff was taken into custody by order of the court, as alleged in the pleading. But it may be collected, that the whole transaction, from the committing of the offence to the imposition of the fine, passed in the presence of the commissioners, and, therefore, we think the averment, that the plaintiff was taken into custody by their order, well sustained.

Another objection was, that the warrant appeared to have been signed and sealed on the day after the 23d of September, on which the court legally sat, and when the adjudication took place. But the warrant (in its heading) bears date of the preceding day, and there was no necessity that it should be signed at the court.

On the two questions, therefore, which were submitted to us, namely, whether the conviction and warrant were conclusive of the facts stated in them, and if so, whether they sustained the pleas, we are of opinion that the matters appearing on those documents were not traversable, and that they did establish the justification.

Judgment for the defendant.

*411]

*DAGLEY, Gent., v. KENTISH.

An attorney having sued for the amount of his bill, which did not contain any item taxable by the statute 2 G. 2, c. 23, the defendant (who had before tendered part of the amount, but objected to the rest as unreasonable) moved to have it referred to the Master, on the ground of the general authority possessed by the Court over its officers. The Court (after conference with the other Judges) refused to interfere.

THIS action was brought by an attorney to recover 25*l.*, the amount of a bill of costs delivered by him to the defendant, who was executor of the will of one Joshua Kentish. The defendant had tendered 14*l.* before the commencement of the action, and pleaded the tender. An application had been made before Parke, J., at chambers, for a taxation, but refused. Issue being joined, and notice of trial given, *Gurney*, in Hilary term, obtained a rule to show cause why the bill should not be referred to the Master for taxation, and proceedings be stayed on payment of the amount taxed, and costs of the action, if the sum should exceed 14*l.*; otherwise the costs to be paid by the plaintiff.

The bill consisted solely of charges for perusing and considering the will of Joshua Kentish, and codicils thereto; preparing a will and codicil; and journeys and attendance on occasion of the same business. The rule nisi was obtained on affidavits alleging the nature of the charges, the tender, and the opinion of the defendant's attorney in this cause, that the charges which it was proposed to strike off were unreasonable. And, as an authority for the interference of the court, *Wilson v. Gutteridge*, 3 B. & C. 157, was cited, where it is laid down that the Court has a paramount jurisdiction independently of the statute 2 G. 2, c. 23, to refer an attorney's bill for taxation. In the present term,

*412] *Sir *James Scarlett* showed cause. The bill contains no taxable item; and it cannot be said that the Court is to exercise a control over its officers in every transaction in which they may have to enforce a demand at law. Notwithstanding the one case cited, a contrary practice has prevailed in numberless instances. Here, matter is pleaded which amounts to a defence if the action

proceed; and issue has been joined; the case, therefore, is not one in which the Court ought to interfere summarily.

Gurney, contra. *Wilson v. Gutteridge* is a clear authority for this application. The Court has an inherent power to control its own officers, independently of the statute; the exercise of that power is for the benefit of the public, and this is a fit case for it.

LORD TENTERDEN, C. J. The general practice has certainly been as it is stated on behalf of the plaintiff. Still the Court may have a general power of referring an attorney's bill for taxation, independently of the statute: it is so laid down in 1 Tidd's Practice (p. 327, 9th ed.), citing *Rex v. Bach*, 9 Price, 349, and an Anonymous case, 2 Chitty's Rep. 155, and *Wilson v. Gutteridge* is certainly an authority in favour of this application. We shall shortly have an opportunity of communicating with the rest of the Judges, and will do so before deciding on the motion.

LITTLEDALE, J. If I was present, and concurred in the decision in *Wilson v. Gutteridge*, I must have done *so inadvertently. My decided opinion [*413 is that the contrary rule has always prevailed in such cases.

Cur. adv. vult.

On a subsequent day in the term,

LORD TENTERDEN, C. J., said: We have referred to the other Judges on this case, and so much doubt is entertained on the point, that we cannot send this bill to be taxed.

Rule discharged.

HIGGINS v. SCOTT.

The statute of limitations bars the remedy only, not the debt, and, therefore, where an attorney for a plaintiff had obtained judgment, and the defendant was afterwards discharged under the Lords' Act, but at a subsequent period a *fi. fa.* issued against his goods, upon which the sheriff levied the damages and costs; it was held, that the attorney (though he had taken no step in the cause, or to recover the amount of his bill of costs, within six years) had still a lien on the judgment for his bill of costs, and the Court directed the sheriff to pay him the amount out of the proceeds of the goods.

THIS was an action for an assault, commenced in the year 1822. One Hyatt was the attorney for the plaintiff. Final judgment was obtained in Michaelmas term, 1823. There were no proceedings taken by Hyatt in the cause, or for the purpose of recovering the amount of his own bill of costs, after Easter term, 1824, when the defendant was brought up under the Lords' Act, and remanded on the plaintiff's undertaking to pay the sixpences, but he failing therein, the defendant was afterwards discharged. In June 1830, a *fieri facias*, directed to the sheriff of Somersetshire, commanding him to levy the damages and costs, issued against the goods of the defendant, at the instance of the plaintiff, and the sheriff thereupon levied 114*l.* Hyatt obtained a rule nisi, calling on the plaintiff or the sheriff of Somersetshire to pay over to him the money levied, on the ground, that he had *a lien to a greater amount on the judgment for his bill of costs. On the rule coming on in Hilary term, it was referred [*414 to the Master to ascertain whether Hyatt had any and what lien. The Master reported that he had a lien to the extent of 92*l.* 10*s.*, unless the debt was barred by the statute of limitations. A rule nisi had been obtained for discharging the former rule, on the ground that the debt claimed by Hyatt was barred by the statute of limitations.

Campbell now showed cause. The statute of limitations bars the remedy, not the debt; and, therefore, it was held by Lord Eldon, in *Spears v. Hartly*, 3 Esp. 81, that although the statute has run against a demand, if a creditor obtain possession of goods on which he has a lien for a general balance, he may hold them for that demand by virtue of the lien.

Follett, contra. The Master has reported in favour of the lien, in the event

only of the debt not being barred by the statute of limitations. Now it is clear that if Hyatt had brought an action against the plaintiff for his bill of costs, the statute of limitations would have been an answer, *Rothery v. Munnings*, 1 B. & Ad. 15; and if the remedy by action is gone, he has no right to enforce his claim by taking from the plaintiff the benefit of the execution now issued by the plaintiff himself against the defendant.

Per Curiam. The statute of limitations bars the remedy, not the debt; and it having been ascertained that Hyatt has a lien, unless the debt be barred by the *statute, it follows that he has a right to the satisfaction of his demand *415] out of the sum now levied. The rule may, however, be made absolute on the sheriff's paying over to Hyatt the sum of 92*l.* 10*s.*

Rule absolute on those terms.

READ v. THOMAS LEE, Gent.

Costs of summons at Judge's chambers not allowed by the Court.

TOMLINSON, on a former day in this term, obtained a rule nisi for discharging an order made at chambers by Taunton, J., whereby the plaintiff was directed to pay the defendant the costs of a former summons before a Judge at chambers in the same cause.

F. Pollock now showed cause, and contended, that the power to give costs followed as a consequence from the power of the Judge to act at chambers; and that it had been the practice occasionally to do so. [LITLEDAL, PARKE, and PATTESON, Js., denied any knowledge of such a practice.]

Tomlinson, contra, was stopped by the Court.

Lord TENTERDEN, C. J. If the subject were investigated very closely, it might perhaps be found that such a power existed. But the practice has not been adopted, and perhaps it is not convenient that it should. The consequence probably would be to prevent parties in many instances from going, as they now *416] do, before a Judge at chambers, where a great deal of interlocutory *matter is disposed of at small expense, instead of coming to this Court. I should be sorry to do anything that might deter parties from resorting to that comparatively cheap remedy; and we probably should do so by holding them liable to the penalty of costs in both instances alike. The order must be discharged.

The rest of the Court concurred.

Rule absolute.(a)

(a) See *Hullock on Costs*, 620, 2d edit. This subject is noticed in the Third Report of the Commissioners on Courts of Common Law, pp. 42, 43, 81.

ASHBROOK v. TOWNLEY and PEET. May 9.

Where a non-bailable writ of latitat issues into a county palatine, and a mandate thereupon is obtained from the chancellor to the sheriff, service of either on the defendant will be sufficient.

A NON-BAILEABLE writ of latitat was issued against the defendants into the county of Lancaster, directed to the chancellor of the county palatine, whereon a mandate was obtained from the chancellor to the sheriff commanding him to take the defendants. A copy of the mandate only was served on the defendants. A rule nisi was obtained on a former day to set aside the mandate for irregularity, on the ground that a copy of the writ of latitat should have been served.

Dodd showed cause. The Court of Common Pleas lately decided this point, and held that the service of the writ was irregular, and that a copy of the mandate should be served, *Earl of Shrewsbury v. Haycroft*, 6 Bingh. 194. [*417] *Where the action is not bailable, the process served must be such process as the party could have been arrested upon previous to 12 G. 1, c. 29. That statute directs that the plaintiff "shall serve the defendant personally, within the jurisdiction of the Court, with a copy of the process," and the act 5 G. 2, c. 27, adds, that there shall be written on such copy an English notice to such defendant, &c., "provided nevertheless, that in *particular franchises and jurisdictions* the proper officer there shall execute the process." In a palatine jurisdiction, the mandate is the process, by virtue of which the body is taken where the process is bailable, and, therefore, that is the process to be served where the proceeding is not bailable.

Tomlinson, contrd. In a late case in this Court one of the Judges (Mr. J. Taunton) gave a decision on this point, contrary to that in *The Earl of Shrewsbury v. Haycroft*. If a mandate is held necessary, the expense of these proceedings will be materially increased.

Per Curiam. The party ought not to be put to the expense both of a latitat and a mandate, but service of a copy of either will be sufficient. The service of the mandate, therefore, was not irregular, and the rule must be discharged.

Rule discharged.

*CALVERT v. JOLIFFE (Sheriff of SURREY). May 9. [*418]

A sheriff by virtue of a *fi. fa.* seized goods upon lands leased to a tenant, sold the same for less than a year's rent, and permitted them to be removed without paying the landlord the year's rent, which was due. The latter brought an action on the case against the sheriff, for such removal, and the Court refused, on payment into Court of the sum which the goods produced, to stay the proceedings until the plaintiff undertook to pay the costs of suit in the event of his not recovering more than the sum paid into Court.

THE defendant, on the 30th of November, 1830, seized under a *fi. fa.* the fixtures, goods, and effects of one Thirk, a tenant under the plaintiff of a public-house, and advertised them for sale on the 7th of December. On the 5th of that month the plaintiff distrained for a year's rent then due, amounting to 105*l.* The sheriff having offered to let the plaintiff take the goods by appraisement (which the latter refused to do), and believing them to be worth more than 105*l.*, sold them by public auction, but they produced 75*l.* only. The goods having been removed by the sheriff, and the year's rent not having been paid to the plaintiff, he brought the present action on the case against the defendant for removing the goods without paying or contenting him for a year's rent then due. A rule nisi was first obtained for staying the proceedings upon payment into court of 75*l.*, the proceeds of the sale, which had been discharged on cause shown before Taunton, J.; and subsequently a rule had been granted by the Court, calling on the plaintiff to show cause why upon payment of 75*l.* into court, and to abide the event of the suit, the proceedings should not be stayed until the plaintiff should undertake to pay the costs of suit in the event of his not recovering against the defendant a larger sum than the amount paid into court.

Chilton, in this term, showed cause. By the statute 8 Anne, c. 14, s. 1, no goods or chattels lying or being upon any lands or tenements leased for lives, term of *years, &c., shall be liable to be taken by virtue of any execution, [*419] unless the *party at whose suit the execution is sued out* shall, before the removal of such goods from off the premises by virtue of such execution, pay to the landlord the rent due, provided such arrears do not exceed one year's rent. The sheriff, therefore, is not called upon to exercise any discretion, but the execution creditor is bound to pay the rent before the goods be removed. [PARKE,

J. If the landlord distrained for his rent, all he could get would be the value of the goods. It would be very difficult to convince a jury that the landlord's damage could exceed the value of the goods.] The legislature intended to give an advantage to the landlord; for the act directs that the landlord shall be paid the year's rent by the execution creditor (not out of the proceeds of the sale, but) before the goods be removed, and the courts have given a liberal interpretation to the statute: thus in *Henchett v. Kimpson*, 2 Wils. 140, it was held that a landlord was entitled to one year's rent before a defendant could sell upon an execution for costs of a nonsuit; and in *Harrison v. Barry*, 7 Price, 690, where a lease stipulated for a rent to be paid in advance, it was held that the sheriff was bound to pay it over to the landlord. The statute, therefore, was intended to give the landlord a full remedy for one year's rent if the goods were removed, whatever they might sell for. The sheriff has no pretence for claiming the interposition of the court. The statute itself protects him from all risk if he complies with its provisions. The goods are not "liable to be taken;" in other words, the sheriff cannot be called upon to levy till the party who seeks to put *420] him in motion shall have paid the rent; then, and not till then, he is "required to levy and pay to the plaintiff (i. e. the execution creditor, not the landlord) as well the money so paid for rent as the execution money." This is not a case in which the Court will countenance an attempt against all established practice, to pay money into court in an action for a tort. The plaintiff is entitled to have the opinion of a jury as to the actual damage which he has sustained.

Platt, contrd. It is the duty of the sheriff to proceed to a sale of the goods, and he did so in this case, believing them to exceed in value the amount of a year's rent. If there had been no execution, the landlord could, by distress, have had no more than the value of the goods; he cannot, therefore, recover more than the produce. [Lord TENTERDEN, C. J. That cannot be laid down as a general rule, for there may have been an improvident sale, and in that case the landlord might recover more. The statute seems to contemplate that the execution creditor should pay the rent.] The legislature probably contemplated that the goods would always exceed in value a year's rent. In practice the year's rent is always paid by the sheriff out of the proceeds of the sale, and not by the execution creditor.

Lord TENTERDEN, C. J. It may, perhaps, be inconvenient in practice to adopt the strict letter of the statute; but, on the other hand, unless the words of the act of parliament be strictly adhered to, the landlord, in order to recover his year's rent, may, in many instances, be put to the expense of bringing an action against the sheriff. It seems to me that the sheriff ought to have followed *421] the course pointed out by the act of parliament, the words of which are clear and unambiguous. The sheriff is not bound to take the goods in execution unless the party at whose suit the execution is sued out shall, before the removal of such goods, pay the landlord a year's rent. When the year's rent is paid, the sheriff is authorized to remove the goods, but not before. By removing the goods before the payment of such rent, he subjected himself to an action by the landlord. I think, therefore, we ought not to allow money to be paid into court in this action, inasmuch as the sheriff has not pursued the course pointed out by the statute.

LITTLEDALE, J. This is an application by the defendant for leave to pay money into court in an action for a tort, and it is undoubtedly contrary to the general rule to permit money to be paid into court in such an action. The act of parliament says that no goods shall be taken in execution unless the execution creditor shall pay a year's rent to the landlord of the premises. In point of practice, perhaps, the rent has usually been paid to the landlord by the sheriff, and not by the execution creditor; but the words of the act of parliament are clear; and as the sheriff has subjected himself to an action by not following the course pointed out by the statute, the plaintiff has a right to

take the opinion of the jury upon the quantum of damages sustained, and I think we ought not to allow money to be paid into court.

PARKE, J. It seems to me, looking at the words of the act of parliament, that the sheriff was clearly wrong in removing the goods before the year's rent had been satisfied by the execution creditor. A right of action against him for so doing thereby vested in the landlord, and we cannot deprive him of it. He is entitled to *recover such damages as accrued to him by reason of the wrongful act of the sheriff. The amount of such damage is for the jury: [*422 they may possibly think they are not even bound to give the sum for which the goods were actually sold.

PATTESON, J., concurred.

Rule discharged.

NEWMAN and Another, Assignees, &c., v. HODGSON. May 9.

Where money has been deposited in lieu of bail, and paid into court pursuant to 43 G. 3, c. 46, and the defendant does not perfect bail in time; the plaintiff will be allowed, on motion, to take the money out of court, though the defendant has rendered himself into custody since the time for putting in bail, if there be no affidavit of merits on his part.

BUSBY had, in this term, obtained a rule to show cause why the sum of 60*l.*, deposited in the hands of the sheriff of Cumberland by the defendant, in lieu of bail, and since brought into court by the sheriff pursuant to the statute (43 G. 3, c. 46, s. 2), should not be paid out to the plaintiffs, with costs out of the sum of 10*l.* in like manner deposited and brought into court, the defendant not having put in and perfected bail in due time.

F. Pollock now showed cause upon an affidavit, stating that the defendant had been rendered by a Judge's order in this cause, since the date of the rule nisi, and was in custody.

Busby, contrd. The render is too late; and, therefore, by the statute 43 G. 3, c. 46, s. 2, which is not varied, as to this point, by 7 & 8 G. 4, c. 71, the plaintiffs are entitled to have the money paid over. In *Parker v. Turner*, 2 Chitt. Rep. 71, where money had been deposited, and an *application was afterwards made for an enlargement of the time for putting in bail, [*423 which had not been perfected in due course, the Court required an affidavit of merits; here the defendant makes none.

Per Curiam. On consideration, we think, as the render was not in due time, and there is no affidavit of merits, the plaintiffs are entitled to what they claim. This is analogous to the case of an application to stay proceedings commenced upon a bail-bond where bail has not been perfected in time; and there an affidavit of merits is always required. The rule must be Absolute.

DOE dem. ALLEN v. OVENS. May 9.

A person whose residence and property were in the diocese of Gloucester, went on temporary business to Bristol, and in the way met with an accident, in consequence of which he was taken to the Bristol infirmary, and died there (and within the diocese of Bristol) a few days after. Probate of his will was granted by the Bishop of Gloucester: Held, that the probate was regular, for the testator had died *in itinere*, and this was a case within the principle of canon 92, Jac. 1, which provides, that when a man dies on a journey, the goods which he hath about him shall not cause his testament or administration to be liable to the prerogative court.

EJECTMENT for a messuage, &c. At the trial before Bosanquet, J., at the last Spring assizes at Gloucester, it appeared that the premises were leasehold, situate in the parish of Frampton Cotterel, in the diocese of Gloucester; that the lessor of the plaintiff was the executor of Thomas Fletcher, who in his life-

time was tenant of the premises; that Fletcher was in the habit of doing jobs with a horse and cart, and that on the 16th of April, 1829, he was going with the horse and cart as usual from his house in Frampton Cotterel to Bristol, and on the way met with an accident, in consequence of which he was taken to the infirmary in the city and diocese of Bristol, and died there in a few days; *424] having on the 18th of April made his will, under which the lessor of the plaintiff claimed. He had no bona notabilia in the diocese of Bristol at the time of his death. Probate was granted by the Bishop of Gloucester. It was objected, on behalf of the defendant, that this was irregular, for that, under the circumstances, probate ought to have been taken out in the Prerogative Court; and, consequently, that the lessor of the plaintiff had no title. The learned Judge refused to nonsuit, but directed a verdict for the plaintiff, giving leave to move that a nonsuit might be entered. In this term

Ludlow, Serjt., moved accordingly. (a) The testator died in the diocese of Bristol, and had bona notabilia in that of Gloucester. Neither of the diocesan courts, therefore, had entire jurisdiction in the administering of his effects, and it was for the metropolitan court to grant probate. It is said in 11 Viner's Abridgment, *Executors*, H. p. 80 (citing from though not referring to 1 Roll. Abr. 909, tit. *Executor*, H. 7), that "if a man dies in a diocese, not having any goods there, but has bona notabilia in another diocese, this will be sufficient bona notabilia for the archbishop to grant administration, &c., because the ordinary where he dies, by the law, is to take as great care of the testator and of his goods as the other ordinary where his goods are." [Lord TENTERDEN, C. J. That only shows that the metropolitan probate in such a case is not void.] In 4 Inst. 335, Lord Coke describes the Prerogative Court of the Archbishop of Canterbury, as "the Court wherein all testaments be proved, and all administrations granted, where the party dying within his province *425] hath bona notabilia in some other diocese than where he dieth." It may be said that this objection is answered by the ninety-second canon, Jac. 1, (b) which provides, "that if any man die *in itinere*, the goods that he hath about him at that present shall not cause his testament or administration to be liable unto the prerogative court." But here, although the testator had no residence in Bristol, it does not appear upon the evidence that he died, strictly speaking, *in itinere*; and even if this were so, it is not clear that the canon applies to the present case. *Cur. adv. vult.*

Lord TENTERDEN, C. J., now delivered the judgment of the Court. In this case, which was tried before my Brother Bosanquet at Gloucester, the question was, whether the lessor of the plaintiff, who claimed a term of years under a will, of which probate had been granted by the Bishop of Gloucester (the diocese where the lands lie), had a good title? The testator died in the diocese of Bristol, and, according to the authority cited from 11 Vin. Abr. *Executors*, p. 80, in ordinary cases a prerogative probate would be necessary. But the testator in this case died at Bristol, whilst he was *in itinere*. Now, the ninety-second canon, Jac. 1, provides, that where a man dies in a journey, his goods which are with him at the time of his death are not bona notabilia; and we think that this case falls within the principle of the canon, which appears to be this, that the goods of the party who so dies are supposed to be, for the purposes of the jurisdiction of the ordinary, in the place where he is domiciled, notwithstanding his personal absence. We are therefore of opinion that the verdict was right.

Rule refused.

(a) Before Lord TENTERDEN, C. J., LITTLEDALE, PARKE, and PATTESON, Js.

(b) 4 Burn's Eccl. Law, 235.

*CURTIS v. BLOW.(a)

[*426]

Testator bequeathed a sum in long annuities, to be applied first to the payment of his debts, and a certain portion of it, afterwards, to vest in trustees for his daughter. On his death, a bill in Chancery was exhibited against his executor for an appropriation of the fund for the daughter's benefit; the executor admitted assets, and a decree was obtained for the appropriation, within two years of the death of the testator. It was not referred to a Master in Chancery to ascertain whether there were any debts outstanding; nor did it appear whether or not this was the fact. The daughter's annuity being afterwards sold, the purchaser brought an action to recover back the deposit money, on the ground that no title could be made. On a case stating these facts: Held, that there was no sufficient title established; and that at least in the absence of a Master's report, it lay upon the vendor to show that there were no debts outstanding, which could affect the annuity.

THIS was an action against an auctioneer for deposit money. On the trial before Lord Tenterden, C. J., at the London sittings after Trinity term 1829, a verdict was found for the plaintiff subject to the opinion of this Court on a case, in which the following were the material facts:—

On a sale by auction, 18th November, 1828, the plaintiff was the highest bidder for a lot described as the life interest of A. B., in 90*l.* a year long annuities, standing in the name of the Accountant-general. By the abstract of title delivered after the sale, it appeared that W. W. had bequeathed 355*l.* long annuities, subject, in the first instance, to the payment of his debts, &c., after which his son was to have such portion of the said 355*l.* long annuities as would equal 205*l.* per annum, and the residue was given to the executors in trust for A. B. his daughter for life, and afterwards in trust for the children of A. B. The annuity in question was the produce of such residue. The testator died in July 1826, and a suit was afterwards instituted in Chancery by A. B. against the surviving executor, in order to have the last-mentioned annuity appropriated: the executor in his answer admitted assets, and a decree was *made in June 1828, by which it was ordered that the executor should transfer [*427] the long annuities into the name of the Accountant-general in trust in the said cause, subject to the further order of the Court; and that the annuity in question should be paid to A. B. during life, or until the further order of the Court. To this title the plaintiff objected, that there had not been any Master's report of debts, in the Chancery suit, and that the fund decreed to be paid to A. B. until the further order of the Court, was not clear from future demands of the testator's creditors. On these and other grounds (which were also discussed in arguing the case, but on which no judgment was given), the plaintiff declined to complete the purchase, and brought an action for the deposit money which had been paid at the sale. This case was argued in the present term by

Spence, for the plaintiff. The defendant could not make a good title to this annuity. It is charged on a specific fund (355*l.* per annum in long annuities) which the testator, in his will, directs to be applied in the first place to the payment of his debts, legacies, funeral and testamentary expenses; "and after that shall be done," he gives to his son such sum in long annuities as shall be equal to 205*l.* per annum, after deducting his proportionate share with testator's daughter A. B., of the debts, &c., and as to the residue of the 355*l.*, he bequeaths it to trustees for A. B. The decree referred to in the case was made (in an amicable suit) without any inquiry into the debts. There is nothing to prevent any of the creditors from filing a bill hereafter to have their debts paid out of the fund on which the annuity is charged. It was the fault of the parties obtaining this decree, that it was not, at the time of the *suit, referred [*428] to the Master to inquire and report whether or not there were debts; the vendor might then, perhaps, have been empowered to make a good title. In *Lowes v. Lush*, 14 Ves. 547, it was held sufficient objection to a title offered by the vendor, that, by a deed executed with a view to the sale, he had committed

(a) This case was argued and determined on a former day in the term, but was unavoidably omitted in its proper place.

an act of bankruptcy (in assigning all his effects), though it did not appear that there was any debt existing upon which a commission could have issued.

Henderson, contrd. There was no necessity in this case for a report of the Master. A bill was filed in the usual course against the executor, for the purpose of having the fund, which was the subject of the bequest, secured and appropriated according to the will. The prayer of such a bill would be that if the executor did not admit assets, the Master should inquire and report. But the executor did admit assets, and the Court made a decree (it is to be presumed on proper consideration), appropriating the funds. By that admission the executor made himself personally liable; from that time a creditor would proceed against him for anything that might be due, and not follow the fund. [Lord TENTERDEN, C. J. The admission is binding as between the parties to the suit, but is it so as to others? Suppose the executor died insolvent: would a creditor be precluded from resorting to the fund on account of the admission of assets? If so, this might be made a contrivance for excluding creditors from their remedy.] A creditor would not be absolutely precluded from resorting to the fund even after a Master's report, *Gillespie v. Alexander*, 3 Russ. 130. A *429] report was out of the question in this case; for after an admission of assets it is contrary to the usual practice to take an account before the Master. This may be collected from *Wall v. Bushby*, 1 Bro. Ch. C. 484. According to the argument on the other side, a good title could never be made while a fund remained subject to the order of the Court of Chancery. No doubt there ought to be a reasonable certainty that the fund is clear of debts, but that may be supplied by the executor's admission of assets, as well as by the Master's report. It has not been shown that there were any debts outstanding, and it ought not to be presumed, especially after a decree made on the contrary supposition. [Lord TENTERDEN, C. J. That was a very short time after the testator's death.] If the conclusion as to debts depended on the length of time elapsed, a line must be drawn somewhere, and it would be very difficult to say where.

Spence, in reply. The admission of assets only operates as between the legatee and executor, not as against a creditor. The executor might not think himself interested in disputing that there were assets. And the admission and decree were made within less than two years after the testator's death. [PARKE, J. If an account had been taken by the Master, and notice given for creditors to come in, would a creditor not doing so have been barred for the future? And if not, when could a title have been made to this property?] The creditor would probably not be barred; but if a reasonable time had elapsed, and none had come in, it might have rested with the party disputing the title to show that there was a reasonable expectation of creditors coming forward.

*430] *Lord TENTERDEN, C. J. The property out of which this annuity was to come is bequeathed after payment of the testator's debts, legacies, and certain other expenses, which are charged upon the fund by a prior and distinct clause of the will. Does enough appear upon the case to satisfy us that there remained no debts to be paid out of the fund? There was indeed an admission of assets, but it has been properly observed that the executor might not consider himself interested in disputing their existence. It does not seem to me at all clear that there may not be claims outstanding, which might diminish the fund so as to leave too little for the payment of the annuity. It is said the plaintiff ought to have shown that there were such claims; but he is a stranger to the property: the defendant, who is the agent of those interested in it, stands in a different situation; and I think the argument that it lay on him to show the non-existence of debts ought to prevail, and, consequently, that there must be judgment for the plaintiff.

LITTLEDALE, J. It seems to me that in strictness a good title could not be made to this annuity, since it could not be ascertained whether any of the debts charged upon the fund, were or were not still outstanding. The executor's admission of assets might show his opinion, but would not prevent creditors, at a

subsequent time, from enforcing their claims upon the fund specifically appropriated for their benefit.

PARKE, J. The portion of long annuities constituting the fund in question was bequeathed in trust for the testator's daughter, after payment of his debts. It was, if the expression may be used, a legacy in remainder, *and the creditors were the prior legatees; and it is not clear upon the case that [*431 all those prior legatees have received the amount of their claims. If there had been a reference to the Master, and he had reported that there were no debts outstanding, that might have thrown it on the plaintiff to show the contrary. But as the case now stands, it cannot be presumed that there are no demands upon the funds preferable to those of the parties claiming to dispose of the annuity.

PATTESON, J. It was incumbent on the vendor to take proper steps for ascertaining that none of the prior claims upon this fund were still unsatisfied. Not having done so, he has failed in making out a title, and the plaintiff must recover. Postea to the plaintiff.

HELPS and Another v. WINTERBOTTOM.(a)

Goods were sold at six months' credit, payment to be then made by a bill or two or three months, at the purchaser's option: Held, PARKE, J., dubitante, that this was in effect a nine months' credit, and, consequently, that an action for goods sold and delivered commenced within six years from the end of the nine months was in time to save the statute of limitations.

ASSUMPSIT for goods sold and delivered. Money counts. Plea, that the action did not accrue within six years. Replication, that the action did accrue, &c., and issue joined. At the trial before Park, J., at the Yorkshire Spring assizes, 1830, a witness, named Kenworthy, proved that he had sold the goods (Spanish wool of the value of 33*l*.) to the defendant on behalf of the plaintiff, on the 20th of May, 1823; *and it appeared from his evidence that the agreement between him and the defendant was for six months' credit, [*432 payment to be then made by a bill at two, or three, months at the purchaser's option; and that the parties had dealt upon these terms before. Nothing was said in the invoice as to the time of payment. The action was commenced on the 14th of January, 1830, and was therefore barred by the statute if the goods were to be considered as having been purchased at only six months' credit. The learned Judge, in leaving the case to the jury, said that the goods must be presumed to have been sold upon the terms of the former bargains, namely, six months' credit, and then payment by a bill at two or three. The jury found for the plaintiff. In the following term a rule nisi was obtained for a new trial, on the ground that no delivery and acceptance of the goods had been proved; that, consequently, the terms of the bargain could only be proved by a note or memorandum in writing; and that the invoice, which was the only written memorandum, said nothing of the time of payment. In Hilary term, 1831,

Wightman showed cause. It is true that, by inadvertence, the delivery and acceptance were not proved; but this was not made a point at the trial, and the objection ought not to prevail now. Then Kenworthy's evidence afforded sufficient ground for the jury to presume that the contract was for six months' credit, and a bill afterwards at two months or three; and if so, the plaintiff might bring an action for goods sold and delivered at the expiration of the nine months, and the statute would not attach till six years had elapsed from that time.

Blackburne, *contrd.* As no delivery was proved, either there is no evidence of a contract, to satisfy the statute of frauds, or the invoice is [*433 that evidence. But the invoice says nothing of the time of the credit, and

(a) This case was argued and determined in Hilary term, but was unavoidably omitted in its proper place.

terms cannot be superadded to those contained in the written instrument. If they could, there was no sufficient proof of an agreement for six months' credit, and payment afterwards by a bill at two, or three, months, at the defendant's option. And if this had been the contract, the declaration ought to have been special, and not merely for goods sold and delivered.

LORD TENTERDEN, C. J. It does not appear that the learned counsel for the defendant was instructed to contend that there was no delivery. All parties seem to have taken it for granted that the goods had been delivered; and I think, therefore, it would not be doing justice to grant a new trial on account of the defect of proof in this particular. As to the terms of the contract, whether they were or were not for such credit as the plaintiff alleged, was a question for the jury, and might have been expressly left to them, if it had been desired on behalf of the defendant. Then, supposing the agreement to have been for six months' credit, and payment at the end of that time by a bill at two, or three, months, I think the action was properly brought. It is commenced in time, whether the term of credit be considered in the whole as eight or nine months; and it appears to me that no action could have been maintained for goods sold and delivered till the eight or the nine months had expired. The plaintiff might have brought an action after the end of the six months, for not giving a bill *434] pursuant to the contract; but then he *would not have recovered the whole price of the goods; he would only have been entitled to such damages as the jury might have thought reasonable for the breach of contract. It was, indeed, once doubted (by Lord Alvanley, C. J., in *Dutton v. Solomonson*, 3 B. & P. 582) whether an action for goods sold and delivered would lie upon the expiration of a contract of this kind, and whether the declaration ought not to be special; but it has been decided in other cases that the action for goods sold will lie;^(a) and I think that on a contract like the present, a declaration at the end of the eight or nine months stands upon the same footing with a declaration at the end of six months where the credit is for that time absolutely. In each case the action for goods sold would not lie before the expiration of the time; but it may properly be brought when the whole credit has elapsed.

LITLEDALE, J. If the contract was for six months' credit, and then a bill to be given at two, or three, this action was in time. In *Dutton v. Solomonson*, and some other cases decided about the same period, it was much discussed whether upon this peculiar kind of contract an action for goods sold and delivered would lie at the end of the six months; and whether that was the proper form of action when the time had expired for which the bill was to be given. The result of the cases is, that at the end of the six months an action lies for not delivering a bill according to the contract, the party being then entitled, not to *435] payment, but to a better security *for his money. In a suit, however, for this cause of action, the plaintiff would probably not recover anything approaching to the whole debt; and this is not the cause of action to which the statute of limitations would apply, upon a declaration for goods sold and delivered. It appears to me that such a declaration, after the end of the time for which the bill was to be given, is correct, and that the action, commenced within six years after the expiration of the two, or three, months, is not barred by the statute.

PARKE, J. If it is established now, that where, on a sale of goods, credit is given for a certain number of months, and payment to be made afterwards by a bill at so many more, an action for goods sold and delivered will lie at the end of the whole time. It was doubted by Lord Alvanley, in the case which has been referred to, whether such an action did then lie, or whether the declaration should not be on the special agreement; but it was settled in *Brooke v. White*, 1 New Rep. 330, that the general form of declaration was proper in such a case. But, in the present instance, I have some doubt whether the statute is not an answer, inasmuch as the agreement for giving a bill is optional in its form.

(a) See *Brooke v. White*, 1 New R. 330; and *Miller v. Shawe*, cited in *Mussen v. Price*, 4 East, 149.

The ground on which it has been held that *indebitatus assumpsit* lies at the expiration of a credit of the present description, has been, that the contract substantially is for so many months' credit, payment to be made at the end of that time, in cash, but security to be given for part of the time by the delivery of a bill at a certain stipulated period.(a) But a difficulty arises where the security to be given is a *bill at two, or three, months; for I do not see, in such a case, how it can be said that there was any [*436 certain credit (after the six months), at the expiration of which *indebitatus assumpsit* would lie for the value of the goods; the contract, as far as regards the bill, being for a time which is at the debtor's option. I should be rather disposed to say, here, that the real contract was to pay in a *bill* at the end of six months, and that if no bill was given at that time, the agreement was broken, and the credit was then at an end.(b)

PATTESON, J. I do not feel the difficulty which has been suggested on account of the option given with respect to the bill. It appears to me that the credit was, in effect, for nine months; that the statute of limitations would begin to run from the expiration of that time, and that before that period the present action could not have been maintained, though the plaintiff might have declared specially on the omission to give a bill at the end of six months. The rule must, therefore, be discharged. Rule discharged.

(a) *Mussen v. Price*, 4 East, 147.

(b) See *Price v. Nixon*, 5 Taunt. 338.

*LEWIS v. BRANTHWAITE.(a)

[*437]

In copyhold lands, although the property in mines be in the lord, the possession of them is in the tenant. The latter, therefore, may maintain trespass against the owner of an adjoining colliery, for breaking and entering the subsoil and taking coal therein, although no trespass be committed on the surface.

TRESPASS for breaking and entering a close of the plaintiff, called Twin-y-colledge, situate in the parish of Monythusloyne, in the county of Monmouth, and digging up and subverting the earth and soil of the said close, and driving, digging, and sinking levels, mines, shafts, and holes in, into, under, along, and through the said close of the plaintiff, and from and out of the said levels so driven, &c., digging and getting large quantities of earth, soil, and stones. At the trial before Bolland, B., at the Spring assizes for the county of Monmouth, 1830, it appeared that the plaintiff was a copyhold tenant of the manor of Abercarne, in the county of Monmouth, of, inter alia, the Twin-y-colledge; and that the defendant being in possession of a colliery lying under land adjoining that of the plaintiff, opened a level under Twin-y-colledge, and took coal therefrom. It was contended, that as there was no evidence that the defendant had ever trespassed on the surface, the plaintiff, a copyhold tenant, could not maintain an action for trespass to the subsoil, he being in possession of the surface only, and the mines and trees being in the lord. The learned Judge directed the jury to find a verdict for the plaintiff, but reserved liberty to the defendant to move to enter a nonsuit. A rule nisi having been obtained for that purpose,

**Russell*, Serjt., and *Blewett*, in Hilary term, showed cause. If the position contended for on the part of the defendant were correct, the lord might, [*438 by opening a pit in some part of his own demesnes or in the waste, work out the mines in the manor, without trespassing on the copyholder. The lord has no possessory, but a reversionary interest only, as the owner of the freehold and inheritance; and the copyholder is in possession of both mines and trees; for, as the claim of the lord to both rests upon the same grounds, what is true with respect to the one is, in general, true with respect to the other. A copyhold was, in its origin, a

(a) This case was also argued and determined in Hilary term.

tenancy at will only. A tenant at will, however, has a possession of everything; for a grant of land passes everything under it; and a demise of *land* passes the same possessory interest in everything comprehended in that term, whether the demise be at will, for years, or for life. It is true that the lessor of a tenant at will may maintain trespass against him if he cut down the trees; because the wrongful act of the lessee in taking upon himself to cut timber concerns so much the freehold and inheritance, that it amounts in law to a determination of the will. 1 Roll. Abr. 860; 2 Ib. 555; Co. Litt. 57 a. Hence it is clear, nevertheless, that the possession of the trees, before the determination of the will, was in the tenant. The will may be determined by any act of the lessor which *disturbs the possession*, and which would be wrongful, except as a determination of the will; as, if the lessor, without consent of the lessee, enters and cuts down the trees demised. Co. Litt. 55 b. This also implies, that before the determination of the will the *439] tenant is in possession of the trees. It is said, *also, that if a stranger cuts trees, the tenant at will shall have trespass. Hale's MSS., cited Co. Litt. 57 b, note 378. That the tenant at will has the same possession as tenant for years or for life is also clear for this reason, that tenant at will may take a release of the inheritance, and thereby his estate is enlarged; Com. Dig. *Estates*, (H. 3); or a confirmation for his life, upon which a remainder may be dependent: 3 Leon, 15.

That lessees for years and for life are in possession of the subsoil cannot be questioned; first, because they may work mines open at the time of the demise, though the word mines should not be named therein; *Clavering v. Clavering*, 2 P. Wms. 388, *Astry v. Ballard*, 3 Mod. 193, *Stoughton v. Leigh*, 1 Taunt. 402. (a) Secondly, because the tenant of the particular estate must be in possession of everything which subsequently passes to the remainder-man. As livery of seisin cannot be made to him in remainder without infringing the possession of the lessee, the law allows livery made to the tenant of the particular estate to enure to him in remainder; but livery enures only in respect of the supposed actual possession of the lessee. Nothing, therefore, can pass to the remainder-man but that which is in possession of the lessee; and as the whole estate does pass to the remainder-man, it follows, of course, that the tenant of the particular estate is in possession of the whole.

That the tenant cannot cut timber or open mines, arises, not from any exception or reservation out of the grant, but because the possession is given to him for a *440] limited time only, after which the thing demised goes to *another who is entitled to have it in the same state as it was at the time of the grant. The lessee, therefore, cannot diminish in quantity or alter in its nature the thing demised, by cutting trees, digging for mines, or changing arable into pasture, or vice versa. The only remedy, however, which the remainder-man has against the tenant, further shows the possession of the lessee, viz. an action of waste. For it was held in *Goodright v. Vivian*, 8 East, 190, after consideration of the authorities, that waste lies not where the place in which, &c., is no part of the demise.

Then, as a tenant at will has the same possession as a tenant for years or for life, and as they are in possession of the whole, it follows that the copyholder is also in possession of the whole. For a copyhold, though originally a tenancy at will, is now something more; and whatever is true of a tenancy at will, in respect of possession, must be true also of a copyhold. Copyholds are to be governed by the rules of the common law, unless a particular custom intervenes, *Fisher v. Whiggs*, 12 Mod. 301. And in *Heydon and Smith's case*, Godb. 172, Foster, J., said, "Without a custom, the lord cannot fell the trees growing on the copyhold any more than upon a lease for years;" and it was held there, that a copyholder might maintain trespass for cutting trees growing on his copyhold, even against the lord. The lord and the copyholder, therefore, are in the same respective situations with regard to the possession of mines and trees as the remainder-man and the tenant for years.

(a) And see *Saunders's case*, 5 Rep. 12 b.

The only ground upon which the position on the other side could be supported is a supposed *reservation or exception out of the grant. That there is no express exception is clear, and in the absence of custom, upon what [*441 principle can such an exception be implied? From the cases of *Bourne v. Taylor*, 10 East, 189, and *Whitechurch v. Holworthy*, 4 M. & S. 340, it is clear that no such implied exception or reservation exists; for if there was an exception, there would be a power to enter upon the copyhold and open mines. But in *Bourne v. Taylor* it was held, that the lord cannot, without a custom, enter on the copyhold to bore and dig for mines; and in *Whitechurch v. Holworthy*, that he cannot, without a custom, enter to cut trees. It follows therefore of course, that the lord, merely as such, could not claim the benefit of an implied reservation.

Campbell, contra. There is no express authority to show that a copyholder may maintain an action for a trespass committed in the subsoil. It may be conceded that a tenant at will has the same possession as a tenant for life or for years, and may therefore have a release of the inheritance or a confirmation for his life. There is a distinction, however, between a freehold and a copyhold interest. In copyholds the interest in the soil belongs to the lord; the tenants of the manor hold at will, according to the custom of the manor. The interest of the copyhold tenant is analogous to that of a person holding under a lease, in which there is a reservation of minerals; and it is clear that the landlord may demise to a tenant, reserving to himself minerals, without a right of breaking the soil. So the lord, when he originally granted the surface to a copyhold tenant, may be considered as having retained in *himself the freehold in the soil. *Bourne v. Taylor* only shows that the lord of a manor has no [*442 right to enter upon the copyholds within his manor, under which there are mines and veins of coal, in order to bore for and work the same, and that the copyholder may maintain a trespass against him for so doing. There the lord entered on the surface of the land. Here the defendant took the coal from the subsoil, and committed no trespass on the surface. It was observed by the Lord Chief Justice in *Rowe v. Brenton*, 8 B. & C. 737, that in many manors the lord is entitled to minerals though he has no right to come upon the land to take them. The lord may have demised the upper stratum of the soil, but not certain strata below; and if so, they are not in the tenant's possession, and trespass must lie at the suit of the lord for breaking and entering into the mines within them. [Lord TENTERDEN, C. J. Trover is the form of action most generally adopted.] There the plaintiff could only recover the mercantile value of the minerals taken. *Whitechurch v. Holworthy*, 4 M. & S. 340, is the authority which presses most strongly against the defendant. There it was decided, that the lord of a manor has no right to enter on a copyhold of inheritance and cut timber for his own use, leaving sufficient for botes and estovers, if there be no custom in the manor. But trees differ in this respect from minerals. The tenant has an interest in the growing trees, in lop and crop and shade, house-bote and plough-bote, but he has no interest in minerals. There is no decision or dictum to show that, in the case of copyhold, the possession of them is in the tenant.

*Lord TENTERDEN, C. J. I am of opinion that trespass is maintainable. It is well established that property may be in one person and pos- [*443 session in another. Although, therefore, the property in a mine be in the lord, it does not follow that possession of it may not be in the copyholder. The property in trees is in the lord, yet the possession of them is in the tenant; and the latter may maintain trespass even against the lord for cutting down trees. Unless, therefore, there be a distinction between trees on the surface of the soil and minerals below, the authorities cited as to trees are in point. No decision or dictum has been cited which warrants any such distinction. The general rule being that he who has the surface has the subsoil, it seems to me that the copyholder has possession of the subsoil, though he may have no property in it. The authorities cited to show that a lessee at will may take a release of the inheritance whereby his estate is enlarged, or a confirmation for his life upon which a remainder may be dependent, are in favour of this opinion. As, then, the possession of a mine is in the copyholder, and not in the lord, the former may

maintain trespass for an entry upon it. The rule for entering a nonsuit must be discharged.

LITTLEDALE, J. I am of the same opinion. It is not disputed that a freeholder, or one holding under him for life, for years, or at will, has possession of the soil from the surface to the centre of the earth; but it is said that there is a distinction in this respect between a copyholder who is the tenant at will of the lord and a tenant of a freeholder; that as the absolute property in *444] the freehold is in the lord, the property in the mine must be in him; and that as the plaintiff could not make use of these minerals, he cannot maintain an action against a wrongdoer for committing a trespass in the soil below the surface. But if the possession of the mine were not in the copyholder, it would be difficult to say to what extent any portion of the subsoil belonged to him. I am of opinion that although the property in the mine may be in the lord, he has not such a possessory right in it as to entitle him to maintain trespass against a wrongdoer; and that the copyhold tenant has such a possessory right; and may recover substantial damages for any actual injury done to the surface, and nominal damages for a trespass committed below the surface. The authorities as to trees are in point. In Com. Dig., tit. *Copyhold*, (K) 7, it is said, "And if the lord cut down trees where by custom the copyholder shall have the lops, an action on the case lies against the lord; and 1 Roll. Abr. 108, is cited. And afterwards, "So if a stranger cut down trees upon a copyhold, the copyholder shall have an action upon the case for the loss of shade, fruit, &c., though it was not the custom for him to take the trees," to which point *Jefferson v. Jefferson*, 3 Lev. 131, is cited. And it is further said that the copyholder in such a case may have trespass. It seems to me that the possession of the soil is in the copyholder from the surface down to the centre of the earth. Here it appears that the defendant came into the plaintiff's subsoil by breaking through from a shaft below the surface. That being so, I think trespass is maintainable.

*445] *TAUNTON, J., having been counsel in the cause, gave no opinion.

PATTESON, J. There is no distinction between a tenant holding under a freeholder, and a copyholder holding at the will of the lord, according to the custom of the manor, as far as possession of the property is concerned. Although the copyholder may have no right to make use of the minerals, he has a sufficient possession to entitle him to maintain trespass against a wrongdoer.

Rule discharged.(a)

(a) During Hilary term, PARKE, J., and during Easter term TAUNTON, J., usually sat in the bail court, hearing motions, &c.

*446]

*REGULA GENERALIS.

Easter Term, 1 W. 4, 1831.

IT IS ORDERED, That instead of the words "the month of Easter or Morrow of all Souls," contained in the rule of this Court of Easter term, in the fifth year of King William and Queen Mary, for regulating the proceedings upon declarations delivered to prisoners in gaol, the words "thirteenth day of Easter term, and thirteenth day of Michaelmas term," be respectively substituted, unless such thirteenth day should happen to be a Sunday, and then, that the fourteenth days of those terms respectively be substituted.

MEMORANDUM.

IN the course of this term William Walton, of Lincoln's Inn, Esquire, was appointed one of His Majesty's counsel learned in the law. was called within the bar, and took his rank accordingly.

END OF EASTER TERM.

CASES
ARGUED AND DETERMINED
IN THE
COURT OF KING'S BENCH,

IN
Trinity Term,

IN THE FIRST YEAR OF THE REIGN OF WILLIAM IV. 1831.(a)

MARTHA RICHARDS v. WILLIAM RICHARDS.

A married woman being administratrix received a sum of money in that character, and lent the same to her husband, and took in return for it the joint and several promissory note of her husband and two other persons, payable to her with interest: Held, that although she could not have maintained any action upon the note during the lifetime of her husband, yet that he having died, and it having been given for a good consideration, it was a chose in action surviving to the wife, and that she might maintain an action upon it against either of the other makers at any time within six years after the death of her husband, and recover interest from the date of the note.

THIS was an action on a promissory note, dated the 20th of November, 1817, for payment to Martha Richards of 300*l.*, with lawful interest, for value received. The defendant pleaded, first, the general issue; secondly, the statute of limitations. The cause was tried before Bosanquet, J., at the Somerset Spring assizes 1830. It appeared that the note was the joint and several note of Thomas Richards, senior, William Richards, and Thomas Richards. Martha Richards, the payee of the note, and present plaintiff, was, at the time when the note was made, the wife, and, when the action *was brought, the widow, of Thomas Richards, senior, one of the makers of the note; he died on the 11th of [*448 July, 1827. The sum for which the note was given was money which belonged to the plaintiff as administratrix of Samuel Reynold, her first husband, and arose from the paying off some securities given to Reynold, and which securities were discharged and the money paid, in the lifetime of Thomas Richards, the second husband. The jury found a verdict for the plaintiff for the principal money and interest from the date of the note. In Easter term 1830, a rule nisi was obtained to enter a nonsuit or reduce the damages to 300*l.*

R. Bayly in Easter term showed cause. The promissory note was a chose in action; and not having been reduced into possession by the husband, it survived to the wife. She, therefore, may now maintain an action on it. The statute of limitations is no answer, because the plaintiff having been a feme covert at the time the note was given, no right of action accrued to her till the death of her husband, and she commenced her suit within six years after that event. She is

(a) During this term, PARRISON, J., usually sat in the bail court to hear motions, &c.

entitled to recover interest from the date of the note by the express terms of the contract between the parties.

Erle and Follett, contrd. First, the note is altogether void; and secondly, if it be valid, the statute of limitations is a bar to this action. First, the note was void in the first instance. No action could be maintained on it, as the husband of the present plaintiff must have joined with her as a plaintiff, and he must have been at the same time either a defendant or liable to the other defendants, his sureties, for contribution, if the action *had been brought against them *149] alone. No action can be maintained where the same person is a co-plaintiff and co-defendant, or a co-plaintiff and liable to the defendant for contribution, *Teague v. Hubbard*, 8 B. & C. 345, *Sparrow v. Chisman*, 9 B. & C. 241. In the latter case one of the plaintiffs undertook to the defendant to provide for the note at maturity; he was therefore bound to indemnify the defendant, and it was held, consequently, that the plaintiffs could not sue. If the note was originally such that no action was maintainable on it, no subsequent change of circumstances could create a right of action on it. Besides, if a personal action is suspended by the voluntary act of the party entitled to it, it is for ever gone and discharged. Thus if an obligor is made executor to an obligee, and administers some of the goods, but does not prove the will, and dies, the debt is extinguished, *Wankford v. Wankford*, 1 Salk. 299. So if a feme obligee marries an obligor it is an extinguishment; it is a release in law of the debt, for it is the act of the obligee herself, *Sir John Needham's case*, 8 Rep. 268. Also where the contract is joint and several, and the right of action is suspended, and gone, as to one of the joint contractors, it is the same as if it had been a joint cause of action only, and it is discharged as to all the contractors, *Cheetham v. Ward*, 1 Bos. & Pul. 630.(a) Here it was the voluntary act of the wife to take a security from her husband; and as during coverture the right of action was thereby suspended, it was for ever extinguished. The note is also void, because it is payable on a *450] contingency only, and not at all *events. If the husband had survived the wife payment could never have been enforced. The time of payment was uncertain, and might or might not ever happen, *Colehan v. Cooke*, Willes, 393. Further, the plaintiff cannot maintain her action, because the note is in the nature of a chattel; it therefore belongs to the executors of the husband, and does not survive to the wife. In *M'Neilage v. Holloway*, 1 B. & A. 218, it was held that a bill of exchange payable to a feme sole, who married before the same was due, was in the nature of a personal chattel, and that the husband might sue in his own name without joining his wife, although the latter had not endorsed the bill. *Philliskirk v. Pluckwell*, 2 M. & S. 393, shows that husband and wife may sue on a promissory note made to the wife during coverture.

But, assuming the note to be valid, the right of action is barred by the statute of limitations. Where several have a right of action, and some are under a disability, but the statute begins to run against one, it operates as a bar to all, *Perry v. Jackson*, 4 T. R. 516. Here the statute began to run against the husband; it therefore is a bar to the right of the present plaintiff. At all events interest cannot be recovered for the time that ran during the lifetime of the husband; for as no action on the note could have been maintained during his lifetime, there was during that time no forbearance of the principal money. Besides, as there was no one in esse entitled to enforce payment, no interest would accrue, *Murray v. The East India Company*, 5 B. & A. 204.

Cur. adv. vult.

*451] *Lord TENTERDEN, C. J., in the course of this term delivered the judgment of the Court.(b) After stating the facts of the case, he proceeded as follows:—The money for which the note was given was lent by Martha Richards, either to her husband, by that means rendering the other two makers of the note sureties for him, or else it was lent to three makers jointly, or else to one of the other two makers, by that means rendering the husband and the

(a) And the Year Books, 21 Ed. 4, 81 b, and 21 H. 7, 29 b, there cited.

(b) The case was argued before Lord TENTERDEN, C. J., LITTLEDALE, PARKE, and PATTERSON, Js

other maker sureties. But for the purposes of the present inquiry, it may be taken to have been lent to the husband, which is the least favourable state of circumstances for the plaintiff's right of action. The case was argued last term, and, upon a consideration of it, we are of opinion that the verdict should stand both for the principal and interest.

We consider that the money was lent to the plaintiff's husband, and that the other makers of the note were sureties for him, which, as I before stated, is the most unfavourable state of circumstances for the plaintiff's right to recover. We entirely concur in one of the arguments urged for the defendant, that, at the time when the note was given, no action could be brought upon it; none could be brought against the husband, because he must have joined the wife as plaintiff, and then he would be both plaintiff and defendant, and none could be brought against the other makers, because they being sureties for the husband, if he and his wife had recovered against them, they would have had an action against him to recover the money which they had so paid.

But upon the death of the husband a new state of things arose, and the question is, how that affects the plaintiff's rights. The defendant contends, that as the note in the first instance was such a one as could not be sued upon at law, it always continued so, and that no change of circumstances could create a right of action, when none existed originally. But we think that conclusion does not follow. The note was not void; it was a good note in form, and there was a good consideration for it; it was a meritorious security, though the forms of legal proceedings would not allow an action to be brought upon it. [*452]

The objections to proceeding at law are merely of a technical nature, and they only apply to the mode of enforcing the security; and if these technical objections cease to exist, there seems no reason why the remedy on the note should not be put on the same footing as if no such objection had existed when the note was given. And that being so, it is to be considered whether the plaintiff's right to recover be affected by any other circumstances in the case.

The general rule of law is, that choses in action, which are given to the wife either before or after her marriage, survive to her after the death of her husband, provided he has not reduced them into possession.

It is material to consider, whether the note be a personal chattel or be a chose in action; if it be a personal chattel, then it belongs to the husband, and the property in it would vest in the husband, and on his death would go to his executors, even though he died in the lifetime of his wife. The case of *M'Neilage v. Holloway*, 1 B. & A. 218, has been cited to show that this note is a personal chattel, and that the property became vested in the husband; but without considering whether the observations made in that case are correct, we think the present differs from it in this respect, that there the instrument existed before the marriage, and the husband brought the action in the lifetime of the wife; and the question was, what effect the marriage had upon it? but here the note was given by the husband himself to the wife after the marriage, and the wife survived the husband; and to hold that to be a personal chattel vesting absolutely in the husband would be to make the note a nullity at the time of its creation. And we are of opinion that, as a promissory note in the ordinary course of things is a chose in action, there is nothing in this case to take it out of the common rule, that choses in action given to the wife survive to her after the death of her husband, unless he has reduced them into possession. In *Co. Litt.* 351 b, it is said "the marriage is an absolute gift of all chattels personals in possession in her own right, whether the husband survive the wife or no; but if they be in action, as debts by obligation, contract, or otherwise, the husband shall not have them unless he and his wife recover them. And of personal goods *en autre droit* as executrix or administratrix, &c., the marriage is no gift of them to the husband although he survive his wife." In *Garforth v. Bradley*, 2 Ves. 675, Lord Hardwicke says, that where a chose in action comes to the wife, whether vesting before or after marriage, if the husband die in the lifetime of the wife, it will survive to the wife, with this distinction, [*454]

that as to those which come during the coverture, the husband may, for them, bring an action in his own name, and may disagree to the interest of the wife, and that recovery in his own name is equal to reducing into possession. Some cases are mentioned by Lord Hardwicke to prove what he states, and many others might be added to that effect. The same doctrine, as to survivorship, was held by this Court in the course of last term, in a cause of Betts, Administrator, against Kimpton, *antè*, p. 273. And there is no doubt but that if security, such as a bond or note be given to a woman during coverture, the husband may, if he pleases, reduce it into possession, and make it his own.

In the present case, the husband in point of fact has done nothing to make the note his own, or to reduce it into possession, and it is very questionable whether in point of law he could if he had wished; but that need not be considered.

Then if the property in the note vested in the wife on the death of her husband, the parties to the note then living were Martha, the plaintiff, the payee of the note, and William Richards, and Thomas Richards the younger, the two surviving makers of the note: there was, therefore, no technical objection then remaining to her bringing an action at law upon it. And there is no objection on the merits, because she is beneficially interested in it, and the surviving makers have given their security for its payment.

It has been said that the note cannot be enforced, because it is payable on a contingency. We do not think that it can be so considered. Upon the face of *455] it there is no contingency; the contingency is only as to the persons who may have a right to enforce it under particular circumstances. If the husband die in the lifetime of the wife, then the right to sue vests in the wife: if, on the other hand, the wife die first, then the note vests in the administrator of the wife, but that does not create such a contingency as to make the instrument void as a note. The cases of contingency were much considered in the case of *Colehan v. Cooke*, Willes, 393, which was referred to in the argument; but there is nothing in that case to bring us to the conclusion that it is void as being payable on a contingency.

As to the statute of limitations: the plaintiff being a married woman is within the protection of the stat. 21 James 1, and she had six years after the death of her husband to bring the action. The statute would have run against the husband, but upon his death an action accrued to her in her own right; and the rather, because in her husband's lifetime no action at law could have been brought upon it.

Then as to the amount of the interest. We think it may be recovered from the date; the note professes to be payable with interest; the person to whom the money was lent has had the benefit of it during the whole time; the husband was not entitled to the benefit of the interest in his lifetime, and the estate to which the plaintiff was administratrix has been kept out of the money since it was lent.

*456] Upon the whole of the case we think that the rule *should be discharged, both as relates to the new trial and also as to the reduction of the damages. Rule discharged.

STREET v. BLAY.

A person who has purchased a horse warranted sound, sold it again, and then re-purchased it, cannot, on discovering that the horse was unsound when first sold, require the original vendor to take it back again; nor can he by reason of the unsoundness, resist an action by such vendor for the price. But he may give the breach of warranty in evidence in reduction of damages.

Seemle, that the purchaser of a *specific chattel* under warranty, having once accepted it, can in no instance return the chattel, or resist an action for the price, on the ground of breach of warranty, unless in case of fraud, or express agreement authorizing the return, or consent of the vendor.

But where the contract is executory only when the chattel is received, as where goods are ordered

the value of a sound horse and one with such defects as existed at the time of the warranty; or he might *return the horse and bring an action to recover the full money paid*; but in the latter case, the seller had a right to expect that the horse should be returned in the same state he was when sold, and not by any means diminished in value;" and he proceeds to say, that if it were in a worse state than it would have been if returned immediately after the discovery, the purchaser would have no defence to an action for the price of the article. It is to be implied that he would have a defence in case it were returned in the same state, and in a reasonable time after the discovery. This dictum has been adopted in Mr. Starkie's excellent work on the Law of Evidence, part iv. p. 645; and it is there said that a vendee may, in such a case, rescind the contract altogether by returning the article, and refuse to pay the price, or recover it back if paid. It is, however, extremely difficult, indeed impossible, to [*462] *reconcile this doctrine with those cases in which it has been held, that where the property in the specific chattel has passed to the vendee, and the price has been paid, he has no right, upon the breach of the warranty, to return the article and revest the property in the vendor, and recover the price as money paid on a consideration which has failed, but must sue upon the warranty, unless there has been a condition in the contract authorizing the return, or the vendor has received back the chattel, and has thereby consented to rescind the contract, or has been guilty of a fraud, which destroys the contract altogether. *Weston v. Downes*, 1 Doug. 23, *Towers v. Barrett*, 1 T. R. 133, *Payne v. Whale*, 7 East, 274, *Power v. Wells*, Doug. 24 n., and *Emanuel v. Dane*, 3 Campb. 299, where the same doctrine was applied to an exchange with a warranty, as to a sale, and the vendee held not to be entitled to sue in trover for the chattel delivered, by way of barter, for another received. If these cases are rightly decided, and we think they are, and they certainly have been always acted upon, it is clear that the purchaser cannot by his own act alone, unless in the excepted cases above mentioned, revest the property in the seller, and recover the price when paid, on the ground of the total failure of consideration; and it seems to follow that he cannot, by the same means, protect himself from the payment of the price on the same ground. On the other hand, the cases have established, that the breach of the warranty may be given in evidence in mitigation of damages, on the principle, as it should seem, of avoiding circuitry of action, *Cormack v. Gillis*, cited 7 East, 480, *King v. Boston*, 7 East, 481 n.; and there is *no hardship in such a defence being allowed, as the plaintiff ought to be prepared to prove a compliance with his warranty, which is part of [*463] the consideration for the specific price agreed by the defendant to be paid.

It is to be observed, that although the vendee of a specific chattel, delivered with a warranty, may not have a right to return it, the same reason does not apply to cases of executory contracts, where an article, for instance, is ordered from a manufacturer, who contracts that it shall be of a certain quality, or fit for a certain purpose, and the article sent as such is never completely accepted by the party ordering it. In this and similar cases the latter may return it as soon as he discover the defect, provided he has done nothing more in the mean time than was necessary to give it a fair trial, *Okell v. Smith*, 1 Stark. N. P. C. 107; nor would the purchaser of a commodity, to be afterwards delivered according to sample, be bound to receive the bulk, which may not agree with it; nor after having received what was tendered and delivered as being in accordance with the sample, will he be precluded by the simple receipt from returning the article within a reasonable time for the purpose of examination and comparison. The observations above stated are intended to apply to the purchase of a certain *specific chattel*, accepted and received by the vendee, and the property in which is completely and entirely vested in him.

But whatever may be the right of the purchaser to return such a warranted article in an ordinary case, there is no authority to show that he may return it where *the purchaser has done more than was consistent with the purpose of trial; where he has exercised the dominion of an owner over it, by sell- [*464]

ing and parting with the property to another, and where he has derived a pecuniary benefit from it. These circumstances concur in the present case; and even supposing it might have been competent for the defendant to return this horse, after having accepted it, and taken it into his possession, if he had never parted with it to another, it appears to us that he cannot do so after the re-sale at a profit.

These are acts of ownership wholly inconsistent with the purpose of trial, and which are conclusive against the defendant, that the particular chattel was his own; and it may be added, that the parties cannot be placed in the same situation by the return of it, as if the contract had not been made, for the defendant has derived an intermediate benefit in consequence of the bargain, which he would still retain. But he is entitled to reduce the damages, as he has a right of action against the plaintiff for the breach of warranty. The damages to be recovered in the present action have not been properly ascertained by the jury, and there must be a new trial, unless the parties can agree to reduce the sum for which the verdict is to be entered; and if they do agree, the verdict is to be entered for that sum.

Rule absolute on the above terms.

*465] *Sir JAMES SHAW, Baronet, Chamberlain of LONDON, v. POPE.
May 25.

The common council of the city of London have by custom a right to make ordinances for regulating carts worked within the city for hire, restraining their number, licensing them, and regulating the manner in which they shall be licensed. A by-law was made in common council, that 420 of such carts, and no more, should, by the president and governors of Christ's Hospital, be allowed or licensed to work for hire within the city;

Held, that such by-law was supported by the custom; and that the discretionary power of licensing was rightly and *ex necessitate* delegated by the common council to a smaller body. And (on motion for a *procedendo*, after return to a *habeas corpus*, obtained by a party sued on the by-law) this Court refused to inquire whether or not the number of 420 was reasonable.

AN action of debt was commenced against the defendant in the lord mayor's court of the city of London, for penalties incurred by working a cart for hire in the city, without license from the president and governors of Christ's Hospital. The defendant sued out a *habeas corpus* in this court, and the lord mayor, aldermen, and sheriffs having made their return, a rule nisi was obtained for a *procedendo*.

The return stated that the lord mayor, aldermen, and sheriffs of London, in common council assembled, had, from time immemorial, had the government and regulation of all cars and carts working for hire within the city, and been accustomed to make and pass, and of right ought to have made and passed, and still of right ought, &c., acts and ordinances for the better ordering and regulating of such cars and carts worked for hire within the city, and for limiting and restraining the number of cars and carts to be allowed to be worked for hire within the same city, and for licensing the same, and regulating the manner in which such cars and carts should be licensed and made known. The return then stated, in the usual manner, the custom (ratified by charter) for the lord mayor and aldermen, with consent of the commonalty in common council, to make ordinances for remedying hard or defective customs, or matters newly arising,
*466] which required amendment, and for which no *remedy had been provided; such ordinances being reasonable, not prejudicial to the king or his people, nor repugnant to the laws or statutes of England. The return then set out an ordinance of common council of the 11th of May, 1829, reciting and repealing certain parts of a former ordinance made in 1681, entitled, "An Act for the government of cars, carts, carrooms, carters and carmen, and for the prevention of fraud in the buying and selling of coals." By one of the repealed clauses of this last-mentioned ordinance, it was enacted, that the number of 420 cars,

and no more, should, by the president and governors of Christ's Hospital, be allowed or licensed to work for hire within the city of London, or the liberties thereof; that each of them should be made known by having the city arms upon the shaft, and a piece of brass with the number upon it; and that if any person should presume to work any car or cart within the said city or liberties for hire, by himself or servants, not being duly licensed or allowed as aforesaid, such person so offending should forfeit 13s. 4d., to be recovered as was after mentioned. By another clause (also repealed), it was enacted, that no cars, &c., should be kept or worked by any wharfingers, woodmongers, or other retailers of fuel, but such cars, &c., as were part of the 420 to be licensed as before-mentioned, under the same penalty of 13s. 4d. The new ordinance re-enacted these clauses without any material alteration, except that the penalties were raised to 5l. The return further stated that the defendant was taken and detained by virtue of a bill original prosecuted against him in the lord mayor's court on the last-mentioned act of common council, in a plea of debt upon demand, of 20l., which was still depending.

*Sir James Scarlett and Crowder now showed cause against the rule for a procedendo. The return is objectionable on two grounds. First, [*467 that part of the by-law which relates to the licensing by the president and governors of Christ's Hospital is not supported by the custom. The return sets out a custom for the common council to pass enactments for the ordering of cars and carts worked for hire within the city, limiting their number, licensing them, and regulating the manner in which they shall be licensed and made known. Now licensing implies a power of selection; a discretion to be exercised; and if the discretionary regulating power is vested by custom in the common council, they are not authorized to delegate it to the president and governors of Christ's Hospital. Secondly, the by-law is unreasonable in limiting the number of carts and cars to be employed in the city of London to 420. If that was a proper number in 1681, it cannot be so now that the trade of the city is so greatly increased. The limitation operates as a restraint on all trades: the common-council have a right, and ought, to amend a by-law when it grows prejudicial to the people; and if they fail to do so the law becomes liable to be disputed.

Erle, contrâ. Supposing the by-law did operate in restraint of trade, it may be good if supported by a custom; this was admitted in *Clark v. Denton*, 1 B. & Ad. 92. In the present case the custom fully bears out the by-law. An ordinance limiting the number of carts plying for hire in London to 420 was held good in *Player v. Jenkins*, Sid. 284; and in *Player v. Vere*, Sir T. Raym. 288, 324, a by-law similar in *part to the present (limiting the number of carts to 420, and giving the control over them to the president and governors of Christ's Hospital) was held good as to that part. The power of limiting the number is incidentally recognised in *Kete v. Mitchell*, 2 Roll. Rep. 413,(a) and that of licensing in the statute 30 G. 2, c. 22, s. 3. The right of delegating this latter authority is expressly within the custom to make ordinances for regulating the manner in which cars, &c., shall be licensed. The licensing by deputy was objected to in *Player v. Vere*, Sir T. Raym. 288, 324; and the answer was returned which may be given here, that "the exercise of power in all great bodies ought to be delegated, and it is impossible otherwise to have it executed." The remaining argument against this rule was as to the reasonableness of the number. (Here he was stopped by the Court.) [*468

Lord TENTERDEN, C. J. That is an inquiry we cannot go into. I think the authorities cited are quite satisfactory, and that the custom is good, and the by-law well supported by it. The mayor, aldermen, and commons of the city, in common council assembled, have, by the custom, power to make ordinances for the regulation of cars and carts working for hire in the city, for limiting their num-

(a) The declaration was for not making good a horse and carroone; and after verdict there was "exception, que null tiel chose come carroone; sur ceo le court demand quel chose ceo fuit, et fait respond que fuit un cart signed ove le citty armes, licensed destre use in London, et fueront un certaine number de eux pur preventer le multitude de eux in le citty, et ceo per le order de le counsell, viz. 400, per que non allocatur."

bar, and for licensing the same, and regulating the manner in which they shall be licensed. It is impossible that this discretionary power of licensing
 *469] *should be exercised by the corporate body at large; they must, ex necessitate, authorize some one to act for them. Why they have selected the president and governors of Christ's Hospital we do not know; but it is to be supposed there are good reasons for so doing. The rule for a procedendo must be absolute. LITTLEDALE, PARKE, and TAUNTON, Js., concurred. Rule absolute.

REYNAL, Gent., one, &c., v. SMITH, Gent., one, &c. May 26.

The clause of 3 Jac. 1, c. 7, s. 1, requiring attorneys to deliver a bill to their clients before charging them with any of the "fees or charges" in the act mentioned, is confined to business done in the king's courts of record at Westminster.

ASSUMPSIT for business done as an attorney; plea, the general issue. At the trial before Lord Tenterden, C. J., at the sittings in London after Easter term 1831, it appeared that the plaintiff was an attorney of the Court of King's Bench, and in the lord mayor's court; and that he was employed by the defendant, also an attorney, to defend a cause for him in the latter court. The present action was brought to recover the amount of the plaintiff's charges on that occasion. The plaintiff had not, before commencing the action, delivered a bill, subscribed with his name, to the defendant; and it was submitted that, on this account, he was precluded from recovering by the statute 3 Jac. 1, c. 7, s. 1, (a)
 *470] which, it was said, applied to accounts between *attorneys, though the subsequent act 2 G. 2, c. 23, did not; the act of 12 G. 2, c. 13, s. 6, having taken them out of the operation of the latter statute, but not of the former; and Heming v. Wilson, 1 M. & M. 529, was cited. Lord Tenterden directed a verdict for the plaintiff, but gave leave to move to enter a nonsuit.

Follett now moved accordingly. (He was directed by the Court to apply himself to the question whether that clause of 3 Jac. 1, c. 7, s. 1, which requires attorneys to give a true bill to their clients before proceeding to charge them with any fees, &c., were applicable to demands for business done in inferior courts.) The clause is applicable. It is true, that in Brickwood v. Fanshawe, Carth. 147, it was held, that an attorney suing for fees disbursed, and
 *471] *failing to produce tickets under the hands of the counsel who received the fees, was not therefore debarred by the statute 3 Jac. 1, c. 7, s. 1, from recovering, because the business was done in an inferior court, and the statute, as it was said, did not extend to such courts. But the clause on which that decision turned, though in the same section with the enactment now in question,

(a) The section is as follows:—"For that through the abuse of sundry attorneys and solicitors by charging their clients with excessive fees, and other unnecessary demands, such as were not, ne ought by them to have been employed or demanded, whereby the subjects grow to be overmuch burthened, and the practice of the just and honest serjeant and counsellor at law greatly slandered; and for that to work the private gain of such attorneys and solicitors, the client is oftentimes extraordinarily delayed; be it enacted, &c., that no attorney, solicitor, or servant to any shall be allowed from his client or master, of or for any fee given to any serjeant or counsellor at law, or of or for any sum or sums of money given for copies to any clerk or clerks or officers in any court or courts of record at Westminster, unless he have a ticket subscribed with the hand and name of the same serjeant or counsellor, clerk or clerks, or officers as aforesaid, testifying how much he hath received for his fee, or given or paid for copies, and at what time, and how often; and that all attorneys and solicitors shall give a true bill unto their masters or clients, or their assigns, of all other charges concerning the suits which they have for them, subscribed with his own hand and name, before such time as they or any of them shall charge their clients with any the same fees or charges; and that if the attorney or solicitor do or shall willingly delay his clients' suits to work his own gain, or demand by his bill any other sums of money, or allowance upon his account of any money which he hath not laid out or disbursed, that in every such case the party grieved shall have his action against such attorney or solicitor, and recover therein costs and treble damages, and the said attorney and solicitor shall be discharged from thenceforth from being an attorney or solicitor any more." Sect. 2 regulates the admission and practice of attorneys in "the king's courts of record aforesaid."

is totally distinct from it. This enactment must be taken by itself; and when so considered, it can receive no other construction than the subsequent provision on the same subject in 2 G. 2, c. 23, s. 23. Now the clause in that act which relates to the delivery and taxing of bills, though at first it was considered by this Court, in *Ex parte Williams*, 4 T. R. 124, as not extending to business in the inferior courts, was afterwards held applicable to such business on a reconsideration of the same case, 4 T. R. 496, and subsequently in *Clarke v. Donovan*, 5 T. R. 694, and the same construction has ever since prevailed; as for instance, in *Smith v. Wattleworth*, 4 B. & C. 364, where the business was transacted in the insolvent court. These cases, upon 2 G. 2, c. 23, s. 23, are also authorities for holding, that by the second enactment of 3 Jac. 1, c. 7, s. 1, the plaintiff ought to have delivered a bill before commencing this action, although it was for business done in the lord mayor's court.

LORD TENTERDEN, C. J. I am of opinion that the statute 3 Jac. 1, c. 7, s. 1, does not apply to business done in the lord mayor's court by an attorney there, who happens also to be an attorney of a superior court, but that the whole section refers to business done in *the superior courts. The first part of it is expressly confined to matters transacted there, and I can see nothing [*472 in the subsequent clause that carries it further: the parties on each side, the attorneys and solicitors, and the masters or clients, are described in the same manner, and the words "all other charges concerning the suits which they have for them," seem evidently to refer to such suits as are contemplated in the previous part of the section, and in which the fees are to be paid and copies taken as there mentioned. And the second and only other section of the act relates entirely to the admission and practice of attorneys in the king's courts of record at Westminster. I therefore think that the whole of the first section is confined to attorneys of those courts, and to business there transacted by them.

LITLEDALE, J. I am of the same opinion. I think the second clause of the first section, requiring attorneys to give their clients a true bill "of all other charges concerning the suits which they have for them," relates, not to suits in different courts, but to charges (as, for instance, in respect of the attorney's own trouble) for which it is not competent to him to obtain tickets, as for the fees or copies mentioned in the preceding clause. It is true, that, in this second part of the section, courts of record are not again mentioned, but I do not think that was necessary. The preceding and subsequent parts of the act expressly refer to them, and I think, therefore, it is clear that the whole was framed with a view to business done in them, and not in inferior courts.

PARKE, J., and TAUNTON, J., concurred.

Rule refused.

*DOE dem. JOHN ROGERS and MARY ROGERS, his [*473
Wife, v. JOHN CADWALLADER. May 26.

In ejectment by a mortgagee, the mere fact of his having received interest on the mortgage down to a time later than the day of the demise in the declaration, does not amount to a recognition by him that the mortgagor or his tenant was in lawful possession of the premises till the time when such interest was paid, and consequently is no defence to the ejectment.

THIS was an ejectment to recover land in the county of Salop. The demise was laid on the 1st of July, 1830. At the trial before Patteson, J., at the Spring assizes for the county of Salop 1831, it appeared that Mary Rogers, before her intermarriage with John Rogers, the other lessor of the plaintiff, became the mortgagee of the premises in question by virtue of a deed bearing date the 7th of May, 1828, and that the interest was payable on the 25th of December in every year. On the part of the defendant (who was tenant to the mortgagor) it was proved, that on the 15th of January, 1831, John Rogers had admitted that he

and his wife had been paid all the interest up to the 25th of December, 1830. It was therefore contended on the part of the defendant that the action was not maintainable, because it was not competent to a mortgagee to treat the mortgagor or his tenants as trespassers at any time during which their lawful possession had been recognised, and that the mortgagee having received the interest on the mortgage money to the 25th of December, 1830, had thereby acknowledged that, to that time the defendant, the tenant of the mortgagor, was in lawful possession of the premises, and *Doe dem. Whittaker v. Hales*, 7 Bing. 322, decided in the Common Pleas in *Hilary term 1831 (but not then *474] in print), was cited as an authority to show that the receipt of interest was a recognition by the mortgagee, that the mortgagor or his tenant was in lawful possession of the premises, and therefore an answer to the ejectment. The learned Judge, on the authority of that case, nonsuited the plaintiff, but reserved liberty to him to move to enter a verdict in his favour.

Talfourd, in Easter term, moved for a rule nisi pursuant to the leave given, on the ground that the payment of interest had no effect on the legal title to the land, which in ejectment must of necessity prevail. The mortgagee had two securities for his money, a possessory title to the land, and a personal covenant for the payment of the principal and interest, and he might enforce his remedies on either, or both, subject to his liability to account in equity. Even payment of the principal, unless a surrender of the term could be presumed, could be no defence at law to an ejectment, and much less could the payment of interest have this operation. The Court of Common Pleas has, in several instances, shown a disposition to relax the strict rules of law affecting the relations of mortgagor and mortgagee, which has not received the sanction of this Court. But even the case of *Doe v. Hales*, relied on at the trial, did not go so far as was necessary to sustain the verdict, as that was not a mere case of payment of interest, but of the receipt of a portion of rent after a threat of distress, which might possibly be held to imply an assent to a tenancy.

*475] *Russell*, Serjt., now showed cause. The defendant was not a trespasser on the 1st of July, 1830. The interest due at Christmas 1830 had then been paid. This state of facts, admitted by the mortgagee in January 1831, was a recognition by him of a lawful and authorized possession by the mortgagor, and those who represented him, in the preceding July. It is undoubtedly true, that a mortgagee may maintain ejectment against the mortgagor without a notice to quit or a demand of possession, *Doe v. Maisey*, 8 B. & C. 767, *Doe v. Giles*, 5 Bing. 421. But in those cases there was no payment of interest or recognised possession. It is unnecessary to contend that receipt of interest creates a tenancy. It is sufficient to say that it sanctions the state of things as between the parties during the time for which the interest is received. Suppose a mortgagee to receive his interest regularly for six years, and then to bring his ejectment, laying the demise six years back, is the mortgagor to be treated as a trespasser for the six years, and liable to an action for six years' mesne profits? So long as a party is in possession of the premises with the privity and consent of the owner, he cannot be treated as a trespasser. Suppose the mortgagor be allowed to remain in possession, paying the interest as the bailiff or agent of the mortgagee only, still he would not, as a person in possession of a farm as the recognised bailiff or agent of the owner, be liable to be treated as a trespasser by action of ejectment. It cannot then be less than a permissive occupation. The mortgagee entitled to possession, instead of taking it, chooses to receive the *476] *interest and permit the mortgagor to occupy, and a permitted occupation will be a defence to an ejectment; as in *Doe dem. Foley v. Wilson*, 11 East, 56, where an enclosure from the waste was seen from time to time by the lord's steward; *Right dem. Lewis v. Beard*, 13 East, 210, and *Doe dem. Newby v. Jackson*, 1 B. & C. 448, where the party was let into possession pending a treaty for a purchase. The decision in *Doe dem. Whitaker v. Hales*, 7 Bing. 322, proceeded on this principle, that there could not be a trespass where there was a permitted and recognised occupation. In a note to *Partridge v. Bere*, 5

B. & A. 605, several cases are collected, tending to show that payment of interest is evidence of an agreement between mortgagee and mortgagor, that the latter shall hold the land as tenant at will.

LORD TENTERDEN, C. J. I think this case is not governed by that of *Doe dem. Whitaker v. Hales*, 7 Bing. 822. There the defendant, in order to show that he was not a trespasser on the 25th of December, 1829, proved that in April 1830 he was in possession of the premises, and that an agent of the lessor of the plaintiff called on him, demanded payment of interest on a mortgage to the lessor of the plaintiff, and received money *eo nomine* as interest, the defendant being required to pay it instead of rent to the mortgagor. Lord C. J. Tindal, after stating these facts, observes, "This, therefore, was a demand made by the agent of the mortgagee, and with full knowledge of all the circumstances of the parties, namely, that the defendant was tenant to the mortgagor, *and not to the lessor of the plaintiff; and if a party employs an agent who [*477 has full knowledge of circumstances, it must be presumed the principal has the same knowledge. So that the lessor of the plaintiff having recognised and availed himself of the possession of the defendant so late as April 1830, cannot treat him as a trespasser in 1829." That case is very distinguishable from the present. The evidence in this case was only that the mortgagee had received interest on the money advanced by him for a period covering the 1st of July, 1830, the day of the demise mentioned in the declaration. By so receiving the interest, he did not recognise the defendant as a person in lawful possession of the premises, nor did he avail himself of that possession to obtain payment of the interest.

LITTLEDALE, J. I cannot say that I am prepared to go to the length which the Court of Common Pleas appears to have done in *Doe v. Hales*. But assuming that case to have been properly decided, the present is very different, for the reasons already stated.

PARKE, J. The proof was, that there had been a payment of interest in respect of the original debt, but that was no recognition of the right of the mortgagor, or his tenant, to hold possession of the premises. *Doe v. Hales* only shows, that where the mortgagee recognises a party as being in lawful possession of the premises at a given time, it is not competent to him to say afterwards that at that time he was a trespasser. Here the lessor of the plaintiff never recognised the defendant as being in lawful possession.

*TAUNTON, J. The evidence is, that the mortgagee had received interest on the money lent and advanced by him. That is no acknowledgment on his part that either the mortgagor or his tenant were in lawful possession of the premises mortgaged. [*478 Rule absolute.

PIERCE MAHONEY, one of the public Officers of the Provincial Bank of Ireland, v. JOHN MUSSON ASHLIN and GEORGE ASHLIN.

May 27.

A bill drawn in Ireland upon a person in England, is not an inland bill, and may therefore be accepted without writing on such bill, notwithstanding the stat. 1 & 2 G. 4, c. 78, s. 2. But that section (as well as 9 G. 4, c. 24, s. 8) applies to bills drawn in Ireland upon persons there.

ASSUMPSIT by the plaintiff, on behalf of the Provincial Bank of Ireland, as endorsees of a bill of exchange drawn upon, and alleged to have been accepted by, the defendants. Plea, the general issue. At the sittings before Easter term 1830, at Westminster, before Lord Tenterden, C. J., the plaintiffs obtained a verdict, subject to the opinion of this Court upon a special case, which stated the following facts:—

The bill was drawn on the 2d of March, 1829, at Limerick, upon the defendants, who were resident in London, payable two months after date. The drawers

wrote to the defendants advising them of the bill, and received a letter from them in reply, saying that the bill would be honoured on acceptance. No other acceptance was given. The bill was presented and dishonoured. It was contended at the trial that the bill had never been accepted so as to make the defendants liable, inasmuch as the statute 1 & 2 G. 4, c. 78, s. 2, enacts that "no acceptance of any inland bill of exchange shall be sufficient to charge any person, unless *such acceptance be in writing on such bill :—" and a subsequent act (9 G. 4, c. 24) relating to bills of exchange in Ireland, contains a clause (s. 8) in nearly the same words. For the plaintiffs it was answered, that the bill in question, having been drawn in Ireland upon parties in this country, was not an inland bill, and might therefore be accepted in the same manner as such bills were before the statute.

Follett for the plaintiffs. A bill drawn in Ireland upon persons in England is not an inland bill within the statute 1 & 2 G. 4, c. 78, s. 2, nor is its character altered in this respect by the act 9 G. 4, c. 24, s. 8. The use of inland bills began in this country long after that of foreign ones. (a) Holt, C. J., states, in *Buller v. Cripps*, 6 Mod. 30, that actions upon such bills began within his memory; and a precise definition of an inland bill is furnished by the statute 9 & 10 W. 3, c. 17, entitled "An Act for the better payment of inland bills of exchange," which, after reciting that inconveniences have arisen by delays of payment and other neglects on inland bills of exchange in this kingdom, enacts (sect. 1) that every bill of exchange "drawn in or dated at and from any trading city or town or any other place in the kingdom of England, dominion of Wales, or town of Berwick-upon-Tweed, of the sum of five pounds sterling or upwards, upon any person or persons of or in London, or any other trading city, town, or any other place," may be protested if not paid within three days after it becomes due. And sect. 3 makes provision for the case *of "such inland bill" being lost before the time of payment. The act 3 & 4 Ann. c. 9, also "for the better payment of inland bills of exchange," recites (sect. 4) the provision just referred to in sect. 1 of the statute of William, and enacts that if drawees shall refuse to accept such bills as are there mentioned, they may be protested, "as in case of foreign bills of exchange;" and the following section contains other enactments relative to "such inland" bills. There is no ground for saying that the legislature, in the act 1 & 2 G. 4, c. 78, uses the term "inland bills" in any other sense than that given to it in 9 & 10 W. 3, c. 17, and 3 & 4 Ann. c. 9. In practice, both Irish and Scotch bills are protested as foreign. Ireland, though subject to England, was a distinct kingdom till the union; 1 Bla. Com. 99; and with reference to the present point it must still be so considered. In *Smith v. Mingay*, 1 M. & S. 87, it was assumed on both sides in argument, as well as by the Court, that an Irish bill of exchange was not subject to the stamp-act 48 G. 3, c. 149, s. 2, and sched. part 1, as an inland bill. The courts of Scotland hold neither an English bill drawn on that country, nor a Scotch bill on England, to be inland. 1 Bell's Commentaries, p. 330, 4th ed., and *Reynolds v. Syme* and *Fergusson v. Belsh*, there cited (note 1), from The Faculty Collections, February 4, 1774, and June 17, 1803. (b) In the act 9 G. 4, c. 24, for consolidating and amending the laws relating to bills and notes in Ireland, the provision that no acceptance of any inland bill of exchange shall be sufficient to charge any person, unless it be made on the bill, appears to have *been introduced on the supposition that the act 1 & 2 G. 4, c. 78, did not apply to Ireland, and for the purpose of regulating acceptances within that country. It cannot affect the construction of this statute.

Campbell, contra. The act 1 & 2 G. 4, c. 78, s. 2, clearly applies to Ireland. There is nothing in the terms of the enactment to restrain its application, and, having been passed since the union, it extends to the whole United Kingdom;

(a) Probably about the year 1645, when banking began to be extensively carried on by the goldsmiths. See Macpherson's Annals of Commerce, vol. ii. p. 427, 519.

(b) See *Milne v. Graham*, 1 B. & C. 192, and *Bentley v. Northhouse*, 1 M. & M. 66, in which cases a Scotch promissory note, negotiated in this country, was considered as foreign.

and the provision in 9 G. 4, c. 24, s. 8, merely repeats what was already the general law of the realm. The reason for confining the enactment, that acceptances shall be written on the bill, to inland bills, evidently was, that the legislature thought it would interfere with commercial transactions too much to extend such a law to bills between merchants of different nations and living at great distances from each other, and who consequently require the facility of giving and receiving acceptances by other means than writing on the bill. This reason does not apply to persons carrying on business in the same kingdom, though in different divisions of it. It could not be said that an exception on such ground was intended for bills between parties living the one just within Scotland, as at Kelso, and the other at Berwick; and yet if Ireland was in contemplation, Scotland must have been so too. In Bayley on Bills, p. 26, 5th ed., the following definition is given:—"Bills are either inland or foreign: inland when made and payable within this kingdom; and foreign when made or payable abroad." Now, although it may be admitted that before the union a bill from Ireland was foreign, Ireland, since that time, is a part of the United Kingdom, as Scotland has been of Great Britain since her union with this country. [PARKE, J. *The stamp-act, 58 G. 3, c. 184, sched. part 1, describes a foreign bill of exchange as a "bill of exchange drawn in but payable out of Great Britain." The bill in question is the converse of that.] As to the cases which have been cited from books of Scotch law, the judgments of the courts in that country, however deserving of respect, are perhaps less entitled to weigh as authority on commercial subjects than on most others; and the decisions which have been cited took place before the act 1 & 2 G. 4, c. 78, and had reference to a statute (12 G. 3, c. 72), passed exclusively for Scotland. [*482]

Lord TENTERDEN, C. J. I am of opinion that this was not an inland bill within the statute 1 & 2 G. 4, c. 78. It is true that act will apply to every part of the United Kingdom, to a bill drawn in Ireland as well as elsewhere; but still that does not determine the meaning of "an inland bill" with reference to the question raised in this case, namely, whether a bill drawn in Ireland upon persons residing in another part of the kingdom, be inland or foreign for the purposes of the act. The statute 9 & 10 W. 3, c. 17, distinctly explains what was understood to be an inland bill at that time, and shows, that by that term was meant a bill drawn in England, Wales, or Berwick-upon-Tweed, upon London, or some other place within those parts of the realm: and the term is used in subsequent statutes, apparently in the same sense. It is indeed admitted that Irish and Scotch bills drawn upon England were foreign before the respective unions between the countries; and it does not follow, because Ireland and Scotland were united into one kingdom with this, that the bills drawn there, which before were foreign, became inland bills. I therefore think the judgment must be for the plaintiff.

*LITTLEDALE, J. I do not think the union between England and Ireland had the effect of converting Irish bills drawn upon this country from foreign into inland. There is nothing in the statute 1 & 2 G. 4, c. 78, to show that any change is there intended in the meaning of the term "inland." The words of the act will have their full effect, and the benefit of it will be sufficiently extended to Ireland and Scotland, if the clause be considered as applying to bills drawn in those countries and this, upon places within each of them respectively. [*483]

PARKE, J. I think the explanation of the term "inland bill" in 1 & 2 G. 4, c. 78, s. 2, is to be found in the expressions which have been referred to in 9 & 10 W. 3, c. 17. There is no doubt that the clause in question in the act of 1 & 2 G. 4 extends to every part of the United Kingdom, and that it applies to the case of a bill drawn in one part of Scotland or Ireland upon another, although this does not appear to have been understood when the act 9 G. 4, c. 24, was passed for amending the law respecting bills of exchange in Ireland. The whole effect intended by the enactment of 1 & 2 G. 4, c. 78, s. 2, probably was to restore the true meaning of 3 & 4 Ann. c. 9, s. 5 (providing that no person should be charged by any acceptance unless written on the bill), which was de-

parted from after it had been held in *Lumley v. Palmer*, 2 Stra. 1000, that that section referred only to the drawer's liability for damages and costs.

TAUNTON, J., concurred.

Judgment for the plaintiff.

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*MONK v. WHITTENBURY. May 28.

A wharfinger having received flour in that capacity, and without any authority to sell, disposed of it to a purchaser who had no notice of the want of authority. The wharfinger was in the habit of doing business as a flour factor: Held, nevertheless, that the act 6 G. 4, c. 94, s. 4, which protects purchases made innocently and in the ordinary course of business from agents intrusted with goods, did not apply to this case, the wharfinger not being an agent within the meaning of the statute.

TROVER for flour and sacks. At the trial before Lord Tenterden, C. J., at the Middlesex sittings after last Easter term, it appeared that the defendant purchased the flour in question of one Cramp, who was a wharfinger, and who had, in that capacity, received the flour from the owner, the present plaintiff, but without any authority to sell it. Cramp was a flour factor as well as a wharfinger; which, it appeared, was not unusual. After receiving payment from the defendant he absconded, and never paid over the money to the plaintiff. Lord Tenterden thought that if the sale in question was made by an agent in the ordinary course of business, to a party not apprised at the time that such agent was unauthorized to sell, the purchaser was protected by the factors' act, 6 G. 4, c. 94, s. 4; and he left it as a question for the jury, whether or not the sale was in the ordinary course of business. They were of opinion that it was not, and therefore found a verdict for the plaintiff. On a former day in this term

Sir *James Scarlett* moved for a new trial. (a) The verdict, as to the particular question put, was against evidence. It is true that, if that be so held, a question of law must arise, whether or not the vendor in this case was an "agent intrusted" with the goods within the meaning of 6 G. 4, c. 94, s. 4; (b) and it *485] may be said, on the other side, that although the party was agent for one purpose, that of receiving and keeping the goods, he was not thereby invested with authority for another, namely, to sell, nor did it render him such an agent as could, by selling, confer a good title on a purchaser by virtue of the statute, notwithstanding his own want of authority. But it had been held before the passing of this act, that an owner of goods may place them in the hands of an agent under such circumstances, that an agency for the purpose of sale may be presumed in behalf of an innocent purchaser, though such agency was not in fact contemplated by the principal. The question in the present case is, whether if a person, being a factor, receives goods from a principal without directions to sell, or any intention on the part of the principal that he should do so, and chooses, notwithstanding, to dispose of the goods in the character of a factor, a party purchasing in ignorance of the want of authority, is not protected by the statute. The meaning of the statute is, that if the buyer in such a case had not notice of the want of authority, the purchase shall not be affected. To say that

(a) Before Lord TENTERDEN, C. J., LITLEDALE, PARKE, and TAUNTON, Js.

(b) Which enacts, that, from and after, &c., "It shall be lawful to and for any person, &c., to contract with any agent or agents intrusted with any goods; wares, or merchandise, or to whom the same may be consigned, for the purchase of any such goods, &c., and to receive the same of, and pay for the same to such agent or agents; and such contract and payment shall be binding upon and good against the owner of such goods, &c., notwithstanding such person, &c., shall have notice that the person or persons making and entering into such contract, or on whose behalf such contract is made or entered into, is an agent or agents: Provided such contract and payment be made in the usual and ordinary course of business, and that such person, &c., shall not, when such contract is entered into or payment made, have notice that such agent or agents is or are not authorized to sell the said goods, &c., or to receive the said purchase-money."

the protection extends only to cases where the vendor had a general commission to sell, *but exceeded it in some particular, would not answer the object of the statute. The case might have been different if Cramp had been [*486 merely a wharfinger, but it was proved that he carried on business as a factor also.

Cur. adv. vult.

Lord TENTERDEN, C. J., now delivered the judgment of the Court. The material question in this case is, Whether Cramp was or was not an agent intrusted with the goods in respect of which the action is brought within the meaning of 6 G. 4, c. 94, s. 4. It is difficult to say precisely what is meant in this section by an "agent intrusted with goods;" but we are clearly of opinion that a wharfinger is not such a person. If a wharfinger were so considered, it would be impossible to say that a carter, a warehouseman, or a packer was not: and although it is true that Cramp transacted business as a factor with some persons, we do not think that can avail the defendant in the present case. There will, therefore, be no rule. Rule refused. (a)

(a) In *Wilkinson v. King*, 2 Campb. 335, the plaintiff sent lead to a wharfinger, to remain at his wharf till it should be sold, but gave him no authority to sell. The wharfinger was accustomed to sell lead from his wharf, and he sold that in question to the defendant. The plaintiff recovered in trover. This case was cited in *Pickering v. Busk*, 15 East, 38, as showing that the transfer of goods into the name of a broker in the wharfinger's books, did not give the broker an implied authority to sell. But Lord Ellenborough said, "That (*Wilkinson v. King*) was the case of a wharfinger, whose proper business it was not to sell; and to whom the goods were sent for the mere purpose of custody."

*The KING v. The Inhabitants of COUNTSTHORPE. May 28. [*487]

By a parish indenture which purported to be made between the churchwarden and overseers of the parish of D., in the county of Northampton, of the one part, and A. B. of Countesthorpe, in the county of Leicester, of the other part, it was witnessed that the said churchwarden and overseers of the parish of D., with the consent of two of his majesty's justices of the peace for the said county, dwelling in or near the said parish, had bound, &c.:

The justices in their written consent in the margin of the indenture, described themselves as justices of the county aforesaid: Held, that the words county aforesaid, had the same meaning as the words said county in the body of the indenture; and, that it sufficiently appeared, by the reference to the latter words, that the consenting justices were justices of the county of Northampton.

UPON an appeal against an order of two justices, whereby Thomas Watts was removed from the parish of Dingley in the county of Northampton, to the parish of Countesthorpe in the county of Leicester, the sessions confirmed the order, subject to the opinion of this Court on the following case.

The pauper was bound apprentice by the sole churchwarden and the overseers of the parish of Dingley, to John March of Countesthorpe, by the following indenture, "This indenture made the 27th day of February, 1816, between John Rhoades sole churchwarden, William Clarke and Stephen Hands, overseers of the poor of the parish of Dingley in the county of Northampton, of the one part, and John March of Countesthorpe in the county of Leicester, frame-work knitter, of the other part, witnesseth that the said churchwarden and overseers of the poor of the said parish of Dingley, by and with the consent of two of His Majesty's justices of the peace for the said county, dwelling in or near the said parish, whereof one is of the quorum, have put and placed, and by these presents do put, place, and bind Thomas Watts, aged fourteen years or thereabouts, a poor child of the said parish, whose parents are not able to maintain him, with him the said John March, and as an apprentice with him to dwell and *serve from the day of the date of these presents, until the said appren- [*488 tice shall accomplish his full age of 21 years, according to the statutes in such case made and provided." (The usual covenants were then inserted.) The indenture was duly executed and attested, and in the margin the magistrates stated their consent in these words: "We, whose names are hereunder written,

justices of the peace for the county *aforesaid* (whereof one is of the quorum), do consent to the putting forth Thomas Watts an apprentice according to the true intent and meaning of this indenture, E. Griffin, Jas. Ord." The magistrates who signed the allowance of the indenture, were magistrates of the county of Northampton, and also for the county of Leicester. The pauper served more than forty days in Countesthorpe under the apprenticeship. The question for the Court was, whether he could gain a settlement by service under this indenture.

Waddington, in support of the order of sessions. It sufficiently appears in this case that the indenture was duly allowed by two justices of the county of Northampton; the words *county aforesaid*, in the margin, may clearly be explained by reference to the words in the body of the indenture. In *Rex v. Hinckley*, 1 B. & A. 273, the indenture stated that the overseers and churchwardens of Monks Kirby, in the county of Warwick, with the consent of justices of the said county, bound the pauper apprentice to T. W. of H., in the county of Leicester, and the justices, in their written consent in the margin, described themselves as justices of the *county aforesaid*, and the Court held, that it sufficiently *appeared that they were justices of the county of Warwick. The *489] only difference between that case and the present is, that in the body of the indenture here, two counties are mentioned, and that Leicester is the county last mentioned before the words, "*with consent of the justices for the said county*;" but the words "*the said parish of Dingley*" (which was before described to be in the county of Northampton) intervene; and "*the said parish of Dingley*" imports Dingley in the *county of Northampton*. The latter words may be considered as repeated immediately after the words "*parish of Dingley*," and then the words "*said county*" following the word "*justices*" will refer to Northampton and not to Leicester. Besides, if there were any doubt, it is wholly removed by the words which follow, "*dwelling in or near the said parish*." Again, as no other justices but justices of the county of Northampton could by law allow the indenture at the time when it was executed, the court will intend, according to the principle laid down by Holroyd, J., in *Rex v. St. Mary's, Leicester*, 1 B. & A. 327, that the words "*county aforesaid*" have reference to the county where they had jurisdiction; because that construction which supports, and not that which destroys, the instrument should be adopted.

Dwarris and Macdonnell, contra. Here two counties are named in the body of the indenture. Leicester is that last named before the words "*justices of the said county*." According to grammatical construction, the words *said county* must refer to Leicester. In an order of removal, as in an indenture, the jurisdiction of the justices must *appear; and in *Rex v. The Inhabitants of* *490] *Stepney*, Burr. S. C. 23, where, in an order of removal, no county was mentioned in the margin, and it was directed to the churchwardens and overseers of Stepney, in the county of Middlesex, and to those of Chesham in Buckinghamshire, and the magistrates only styled themselves, in the body of the order, justices of the peace "*for the county aforesaid*," it was quashed, on the ground that, as two counties were previously mentioned, it was doubtful of which they were magistrates; whereas it should have appeared that they were justices of Buckinghamshire, where the parish was situate, from whence the removal was made. In *Rex v. Chilverscoton*, 8 T. R. 178, such an order was held to be absolutely void. In *Rex v. Hinckley*, 1 B. & A. 273, the jurisdiction of the justices was distinctly set forth in the body of the indenture, and it was there decided that the words in the margin of the indenture, *with the consent of the justices for the county aforesaid*, must be construed with reference to the words in the body of the indenture. Here the ambiguity of the words in the margin is increased by the ambiguity in the body of the indenture.

LORD TENTERDEN, C. J. The case of *Rex v. Hinckley* would be an authority to show that the words "*county aforesaid*," in the allowance in the margin of the indenture, are to have the same meaning as the words "*said county*" in the body of the indenture; but it unfortunately happens in this case, that two coun-

ties are mentioned in the body of the indenture before the words "*justices of the peace for the said county*," and that *Leicester is the one last named; [491] whereas the justices who give the required consent, should be justices of the county of Northampton. I think we cannot intend that the county of Northampton was meant, merely on the ground that the indenture would otherwise have no effect. It seems to me, however, that it does sufficiently appear here, by the other parts of the instrument, that the words *said county* refer to the county of Northampton. The indenture states, "that it was made between the churchwarden and overseers of the poor of the parish of Dingley in the county of Northampton, of the one part, and John March of Countesthorpe in the county of Leicester, of the other part; and it then witnesses, "that the said churchwarden and overseers of the poor of the *said parish of Dingley*" (which had before been described to be in the county of Northampton), "*with the consent of two justices for the said county dwelling in or near the said parish*, have put," &c. Now, reading the instrument as a man wishing to understand it, would read it, I should understand the words *justices of the said county*, as referring to the justices of peace of that county in which Dingley is situate, and that was the county of Northampton.

LITTLEDALE, J. I think we are not at liberty to intend that the words *said county* refer to Northampton, because otherwise the instrument would be void; but I think it does sufficiently appear here, that the justices consenting were justices of the county of Northampton.

First of all, it describes the binding parties as the churchwarden and overseers of the poor of the parish of Dingley in the county of Northampton, and it afterwards *says, that the said churchwarden and overseers of the poor of the *said parish of Dingley*, with the consent of two justices for the *said* [492] county, dwelling in or near the said parish, &c. The words *said parish of Dingley*, mean the parish of Dingley in the county of Northampton; and if the latter words had been again repeated, there could be no doubt that the words "*said county*" meant the county of Northampton. The effect of the word *said parish of Dingley*, is to incorporate, by relation, those words as part of the description of the parish of Dingley.

PARKE, J. Looking at the whole of the instrument together, I think that no person who reads it with the intent of putting a reasonable construction on it, and not of overturning it, can doubt the meaning. *Rex v. Hinckley* decides, that the words *county aforesaid* in the margin are to have the same meaning as the words *said county* in the body of the indenture; and here, looking at the context of the instrument, I have no doubt that the words *said county* mean the county of Northampton.

TAUNTON, J. The last county named before "*justices for the said county*," undoubtedly is Leicester, but immediately before those words, there are the words "*said parish of Dingley*." That parish had been before described as being in the county of Northampton. I think, therefore, that the words "*justices for the said county*," may be read, *justices for that county in which Dingley is*. But, besides, this being a mere formal *objection, which goes to [493] defeat justice, ought not to be encouraged; and I should be disposed to put this case upon the broad ground which Holroyd, J., a most learned, as well as cautious Judge, took in *Rex v. St. Mary's, Leicester*, 1 B. & A. 327; viz., that where two counties are mentioned in the body of the indenture, so as to make it ambiguous to which the justices belonged, we should intend that the words *said county* have reference to the county where the justices have jurisdiction, upon the principle, that that construction which supports, and not that which destroys the instrument, should be adopted.

Order of sessions confirmed.

The KING v. The Inhabitants of CREDITON.

A pauper agreed with a sawyer for a twelvemonth to learn sawing, and was to have 7s. 6d. out of every 20s. earned by his master and himself; he served out the year in the parish of A., providing his own board and lodging; at the end of the year he made a new agreement for another year, at an increased allowance; and he lived out the second year with his master in A. : Held, that he did not thereby gain a settlement in A., inasmuch as the principal object of the agreement between him and his master being, that he should learn and his master teach him sawing; it was a defective contract of apprenticeship.

ON appeal against an order of removal, whereby Joseph Middlewich, his wife and children, were removed from the parish of St. Mary Major in the city and county of the city of Exeter, to the parish of Crediton in the county of Devon, the respondents proved a settlement by hiring and service in Crediton. The appellants then set up a subsequent hiring and service in a third parish, St. Edmund's. The sessions confirmed the order, subject to the opinion of this Court on the following case, respecting the alleged settlement in St. Edmund's :—

*494] *The pauper agreed with one West, a sawyer of the parish of St. Edmund's in the city of Exeter, for a twelvemonth, to learn sawing, and was to have 7s. 6d. out of every 20s. earned by his master and himself. He served out that year, providing his own board and lodging. At the end of the year he made a new agreement with West for another year, under which he was to receive 8s. out of every 20s. earned by his master and himself. Nothing was said about Sundays, or the hours he was to work, but he was occasionally absent without permission from West. He lived out the second year with West in the parish of St. Edmund's.

Crowder was to have argued in support of the order of sessions, but the Court called upon

Praed, contrd. It may be conceded, that where an apprenticeship only is intended, a contract of hiring cannot be set up. But it must appear that the relation of teacher and pupil was contemplated. A pauper may hire himself in order to learn a trade, but the master may be incompetent to teach. There must be a mutuality in the contract. There must not only be an intention on the part of the pauper to learn, but an obligation on the part of the master to teach. In *Rex v. Mountsorrel*, 2 M. & S. 460, where the contract was held to be one of apprenticeship, the master received pay for teaching his trade to the pauper. In *Rex v. St. Margaret, King's Lynn*, 6 B. & C. 97, there was no indenture on account of the property of the parents, but there was an undertaking by the master to teach. In *Rex v. Combe*, 8 B. & C. 82, the master contracted to teach. In *495] *the present case there was no contract by the master to teach, without which there can be no contract of apprenticeship. Here, too, after the term for which the parties had contracted the relation had expired, the pauper served for another year under an entirely new agreement, in which there was no mention of learning or teaching the trade. Besides, the nature of the service is to be considered. A sawyer, whether he hires an apprentice or not, must have some person to work with him. *Rex v. Little Bolton*, Cald. 367, and *Rex v. Eccleston*, 2 East, 298, are authorities to show that a contract like the present is one of hiring and not of apprenticeship; and in *Rex v. Coltishall*, 5 T. R. 193, where A. clubbed with B. for three years (which signifies one person contracting to serve another for the purpose of being taught some art or mystery), and also agreed to do any work that B. set him about, it was held that A. gained a settlement by serving B. *Rex v. Martham*, 1 East, 239, is to a like effect.

LITTLEDALE, J. It seems to me the sessions came to the right conclusion. In all the cases cited there was some work to be done, though there was a contract to learn. This case falls within *Rex v. Bilborough*, 1 B. & A. 115. There one Smith, by parol, agreed with the pauper to teach him to make stockings during the year, for which Smith was to receive two guineas, and the pauper was to have his earnings, paying the master for the use of the frame, &c.; and it was held that no settlement was acquired by living out the year under the

agreement, for the pauper never contracted to serve the master, the only agreement *was that the master should teach the pauper for a year. In *Rex v. St. Mary Kidwelly*, 2 B. & C. 750, the father of the pauper agreed by [*496] parol to give a shoemaker a guinea a week for teaching his trade to the pauper for twelve months, and it was held that that agreement created the relation of teacher and scholar, and not that of master and servant. In *Rex v. The Hamlet of Walton*, Carth. 400, 2 Bott, pl. 267, the pauper was put out to a barber for one year to learn to shave, and the barber was to have the benefit of the boy's work, and received some money for teaching, and the boy lived with him for a year : it was held that the boy was in the situation of a scholar, and not of a servant. On the other hand, in *Rex v. Hitcham*, Burr. S. C. 489, where the pauper agreed to let himself to his brother, who was a carpenter, for a year, and was to receive no money by way of wages, but his brother was to teach him as much as he could of the trade during the time, and provide him with meat, drink, washing, and lodging, and the pauper was to do all his brother's business in the farming way : that was clearly held to be a contract for service and a hiring for a year. Here, as by the express terms of the contract, the pauper was to learn, an obligation on the part of the master to teach must be implied. The agreement for the second year is substantially the same as that for the first. The only difference is that the wages are increased.

PARKE, J. I think the sessions have put the right construction on this contract. To gain a settlement by hiring and service, the pauper must have hired *himself to serve for a year. Here the relation of master and apprentice, [*497] not that of master and servant, was created. The case is not distinguishable from *Rex v. Bilborough*, 1 B. & A. 115. There the contract was that the master was to teach the pauper ; here it is that the pauper shall learn ; but if the one is to learn, it must be implied that the other is to teach. The only difference between the agreement for the first, and that for the second year, is that the wages were different ; in other respects the contracts are the same.

TAUNTON, J. I am of opinion that the relation contemplated in this case was that of master and apprentice. The only difference between the first and second agreement is in the sum to be received by the pauper. What then is the purpose for which the pauper agreed to contract any relation with West ? It is stated expressly in the agreement to be to *learn* sawing. I take the true distinction in these cases to be this : where teaching on the part of the master, or learning on the part of the pauper is not the primary, but only the secondary object of the parties, that will not prevent (where work is to be done for the master) the contract being considered one of hiring and service. In all the cases cited, where the contract was so considered, it appeared that the pauper agreed to work for his master, and the master undertook to teach him the particular trade in which he was conversant ; but the teaching and learning were incidental, and therefore it was held to be a contract of hiring. But where teaching and learning *are the principal object of the parties, though there was a [*498] service, the contract is considered to be one of apprenticeship.

Order of sessions confirmed.

The KING v. JAMES CORNISH. May 28.

An order of justices directing A. to pay the churchwardens and overseers of the poor of a parish a weekly sum for the maintenance of B. and C., his grandsons, as long as they shall be chargeable to the parish, is good, without stating that the father is unable, absent, or dead.

Two justices ordered the defendant to pay to the churchwardens and overseers of the parish of Hockworthy, in the county of Devon, the weekly sum of 2s. 6d., for and towards the relief and maintenance of Thomas Farr and William

Farr, his grandsons, as long as they should be chargeable to the parish. A rule nisi had been obtained for quashing the order, on the ground that it was not stated therein that the father was either dead or unable to maintain the children.

Follett now showed cause. By the statute 43 Eliz. c. 2, s. 7, it is enacted "that the father and grandfather, and the mother and grandmother, and the children of every poor, old, blind, lame, and impotent person or other poor person not able to work, being of sufficient ability, shall, at their own charges, relieve and maintain every such poor person, in that manner, and according to that rate, as by the justices of the peace of that county where such sufficient persons dwell, or the greater number of them, at their general quarter sessions shall be assessed." By the 59 G. 3, c. 12, s. 26, any two or more justices of the peace for the county in which any such sufficient person shall dwell, are empowered "in any petty session to make such assessment and order for the relief *499] of every poor, old, blind, lame, impotent, or other poor person not able to work, upon and by the father, grandfather, mother, grandmother, or child (being of sufficient ability), of every such poor person, as may by virtue of the said act be made by the justices in their general quarter sessions." The question is, whether the justices, by this statute, are compelled, in the first instance, to make an order of maintenance on the father, if he be living and able to maintain? And, secondly, if they be, whether it must appear on the face of any order upon the grandfather, that the father is not living, or able? It is undoubtedly stated in 4 Burn's Justice, p. 166 (26th edit.), on the authority of *The Queen v. Joyce*, 16 Vin. Ab. tit. *Poor* (C), pl. 3, that "though the father be living, yet if he be unable, the grandfather, being of ability, may be compelled to keep the grandchild, and also to pay so much money as the justices shall think reasonable for the time past." And Mr. Nolan, in his *Treatise on the Poor Laws*, vol. ii. p. 263 (4th edit.), upon the authority of the same case, lays down the same position. The question, however, must turn on the construction of the act of parliament, by which the legal obligation on a grandfather to maintain his grandchildren is created. The enactment of the statute of 43 Eliz. c. 2, s. 7, is not merely that the grandfather shall be liable to maintain his grandchildren in case the father is not able, but it is absolute that the father and grandfather, if of sufficient ability, shall maintain such poor persons. And this is not varied by 59 G. 3, c. 12, s. 26. But assuming the true construction of the statutes to be, that the grandfather is not to be called upon unless the father be unable, still it is not necessary that that inability should be stated on the face of the order. *500] The justices are only bound to set out such facts as are necessary to give them jurisdiction.

Rogers, contra. If the justices are bound to inquire into the circumstances of the father before they rate the grandfather, and if their power to rate the grandfather only arises upon their father's inability, then they are bound to show that inability upon the face of the order as a necessary step to found their jurisdiction. Now it may be admitted that the statute does not seem in terms to require that such a statement should appear on the order; but looking at its object and spirit, such will be found to be the most reasonable construction. The duty of providing for children was a duty of imperfect obligation, and the statute was made to enforce it. In *Rex v. Munden*, 1 Stra. 190, Pratt, C. J., says, "There being no temporal obligation to enforce the law of nature, it was found necessary to establish it by act of parliament, and that *can be extended no further than the law of nature went before.*" If, therefore, the object of the act was merely to enforce the law of nature, it is to that law we must look for the right construction of the act. Now, by the law of nature, the duty of providing for a child falls, in the first instance, upon a parent, and a more remote relation cannot be chargeable with it, unless the parent is unable, or dead, or absent. Were this otherwise, it would lead to the monstrous conclusion, that a father might be living in affluence and splendour, and have deserted his children, and a magistrate might, nevertheless, pass him over, and charge the grandfather with their maintenance; if a

*magistrate may do this, the present order is good, but if not, then he must account, in some way, why he does not charge the father before he proceeds to make an order on the grandfather. The authorities on this point are certainly scanty; but it does happen, that in all the reported cases, where an order has been made on a more remote relation, and the order is set out, the reason for not making the order on the person immediately chargeable has been always stated, viz., too poor, dead, or beyond the sea. In *Regina v. Joyce*, 16 Vin. Abr. 423, tit. *Poor*, C. pl. 3, the order stated that "the grandfather should keep the grandchild, the father being living but unable to do it." In a case cited, Vin. Abr. *Poor*, (C) pl. 5, in marg., "a father was ordered to allow a maintenance to a son's wife, he being beyond sea." And, although this order would be now held bad on another ground, namely, that the statute only extends to natural relations (*Rex v. Munden*), yet it shows the practice, that where a remote relation is to be charged, the reason why the order is not made upon the person immediately liable must be assigned. So also in *Rex v. Robinson*, 2 Burr. 799, which was an indictment for disobeying an order of this description, Sir James Burrow, who was a great sessions lawyer, in the marginal note says, "The order recites the death of the father of the children, their being destitute of subsistence, the complaint of the parish, the ability of the grandfather to maintain them, and *other proper foundations* for such an order." So also Mr. Nolan, 2 Nolan, 263, 264, speaking of *Regina v. Joyce*, says, that although the father be living, yet if *he be unable*, the grandfather, being of sufficient ability, may be compelled to keep the *grandchildren. Upon the authority, therefore, of precedents and practice, as well as upon the reasonable construction of the statute, this order is bad, being made *per saltum* on the grandfather, and no reason stated why the father is not charged. [*502]

LORD TENTERDEN, C. J. The question is, whether the magistrates, to justify the making a charge upon the grandfather, were bound to state on the face of their order that the father was dead, or unable to support his children? There is nothing in the act of parliament to show that the obligation of the grandfather is absolute only in the event of the father being unable; and that being so, I think the justices who made this order were not bound to assign on the face of it any reason why they made it on the grandfather.

LITTLEDALE, J. I think it was not necessary that the justices should, in their order upon the grandfather, account for the father. It seems to me that the statute gives the justices a discretionary power, and if the grandfather be a rich man and the father a poor man, they may, in the exercise of that discretion, make an order on the former to maintain his grandchildren.

PARKE, J. I am disposed to agree upon the construction of the statute in what has been laid down: and at all events, I think the magistrates were not bound to state in the order, that the father was either dead or unable to maintain his children.

TAUNTON, J. I am also of opinion that it was not necessary for the justices to state in their order that the *father was not of sufficient ability to support his children; for in the case of an order the Court will intend that the justices have done right, if the contrary does not appear on the face of it. [*503]

Rule refused.

The KING v. The Inhabitants of HUNTSHAM. May 28

In 1818 the pauper took of one A. a field of potatoes, at the rent of 12*l*. A. agreed to supply lime and manure, and to give the field three ploughings to prepare it for planting potatoes, without which the field would have been worth less than 10*l*. a year. About a week after the agreement the pauper entered upon the land, it having then been only once ploughed, and no lime or manure having been supplied, but A. performed all he had agreed to do, before the pauper planted his potatoes, and the field was then worth 12*l*. a year: Held, that as by contract the land was to be made of the value of 10*l*. a year at the landlord's expense, the tenement was of that value within the meaning of 13 & 14 Car. 2, c. 12, when the pauper came to settle, though the improvement was not completed until after he entered.

UPON an appeal against an order of two justices, whereby Henry Vinnicombe was removed from the parish of Stampford Peverell in the county of Devon, to the parish of Huntsham in the same county, the sessions confirmed the order, subject to the opinion of this Court on the following case:—

The pauper's birth settlement was in Huntsham. On the 1st of April, 1818, he took of one Hewett, in the parish of Burlescombe, a field for potatoes, at the rent of 12*l*. Hewett agreed to supply twelve hogsheads of lime and a heap of manure, and to give the field three ploughings to prepare it for the pauper to plant his potatoes, without which the field would have been worth less than 10*l*. a year. About a week after the agreement, the pauper went upon the land and worked upon it, at which time the field had only been once ploughed, and none of the lime and manure had been then supplied; but Hewett performed all that he had agreed to do before the pauper planted the potatoes. The pauper, who *504] took off his crop in the *autumn, planted the potatoes himself, and paid the whole rent of 12*l*.; and the field, ploughed and manured as it was by Hewett, was worth that sum. The pauper went to live in Burlescombe in the year 1817, and lived there during the whole time that he occupied this field, which was about six months, and he occupied the field for more than forty days after Hewett had done his work.

Follett and Kekewich in support of the order of sessions. The tenement occupied by the pauper in Burlescombe was not of the annual value of 10*l*. when he came to settle upon it, and a tenement must be accounted of the value which belongs to it at the time when the pauper comes to settle. That was the time contemplated by the statute 13 & 14 Car. 2, c. 12. If the value is increased by labour bestowed on it after the letting and occupation, that cannot be taken into account; *Rex v. Aston*, 6 M. & S. 54. Though where the labour has been bestowed previously to entering on the premises, so as to make the land fairly worth the rent at the time of entry, the Court cannot separate the value of that labour from that of the land. The decisions are somewhat contradictory. In *Rex v. Ringwood*, 1 M. & S. 381, the occupier of a cottage took land at the rent of 2*l*., from Easter to October, for planting potatoes, and the ground had *already* been dug by the landlord for that purpose (which circumstance was relied upon by Le Blanc, J.), without which it would not have let at more than half price; but it was held to be worth 8*l*. in estimating the value with a view to the question of settlement. In *Rex v. West Cramore*, 2 M. & S. 132, there was a similar decision; and there *the ploughing and manuring were begun, but *505] not finished, when the tenant took the land, but were completed before he entered upon it, which last fact was noticed by Lord Ellenborough. In *Rex v. Poulton-with-Fearnhead*, 6 M. & S. 252, the renting of twenty-seven perches of land for growing potatoes, at the price of 2*s*. 6*d*. per perch, under an agreement with the landlord that he should furnish the tenant with manure sufficient for the culture of potatoes, was held to be a renting at 3*l*. 7*s*. 6*d*., although the manure was not furnished until after the holding commenced, and without the manure the land was not worth 2*s*. 6*d*. per perch. But that goes much further than the preceding cases.

Coleridge, contra. In *Rex v. Aston*, 6 M. & S. 54, the improvement was made at the expense of the tenant. *Rex v. Poulton-with-Fearnhead* is recon-

cileable in principle with the former cases, and shows that it is sufficient if the tenement either be worth 10*l.* at the time of entering, or be, by the contract between the landlord and tenant, to be made of that value at the landlord's expense; for the tenant comes to settle on a tenement of that value within the meaning of the stat. 13 & 14 Car. 2, c. 12, although the improvements do not take place till after the time of the entry. (He was stopped by the Court.)

Lord TENTERDEN, C. J. This case is not distinguishable from *Rex v. Poulton-with-Fearnhead*, and must be governed by it. The order of sessions must therefore be quashed.

The rest of the Court concurred.

Order of sessions quashed.

*The KING v. The Churchwardens and Overseers of ST. BARTHOLOMEW THE GREAT, LONDON. May 28. [*506]

To a mandamus calling on churchwardens and overseers to summon a meeting for the purpose of establishing a select vestry for the concerns of the poor, pursuant to 59 G. 3, c. 12, a return was made, stating that there was by custom, an ancient vestry in the parish, which had from time immemorial consulted and deliberated on parochial matters, and acted as a select vestry for the concerns of the poor; and that they had immemorially been accustomed to perform the duties imposed on select vestries by the statute:

Held, that the return was bad, since the statute imposes some duties, as the management of money raised by poor rates, and making orders for the government of overseers, which could not have existed before the statute 43 Eliz. c. 2.

A MANDAMUS issued, calling upon the churchwardens and overseers of the poor of St. Bartholomew the Great, in the city of London, to give public notice of a vestry of such of the inhabitants of the said parish as were by law entitled to attend vestry meetings, and of the place and hour of holding the same, for the purpose, if they should think fit, of establishing a select vestry for the concerns of the poor of the said parish, and of nominating and electing the members thereof, if it should appear to the vestry so summoned, that such select vestry ought to be established in pursuance of and according to the statutes in that case made and provided; or that the said churchwardens and overseers should show cause to the contrary. The return made by the churchwardens and overseers stated, that the said parish was an ancient parish, and that there was and had been in the same, from time immemorial, an ancient and laudable custom, that the rector of the church of the said parish for the time being, and the two churchwardens for the time being, and such parishioners of the said parish as should have served the office of upper churchwarden of the said church, and such other parishioners as should have been elected by the suffrage of the greater number of the said rector and parishioners, *being members of the ves- [*507] try of the said parish, in vestry parochially assembled, were used and accustomed to be members of the said vestry of the said parish, and, exclusively of the other parishioners, to meet in the vestry of the said church, and there to consult, treat, and deliberate among themselves of the parochial matters and other things concerning the said church and parish, or the advantage and benefit of the said parish, and to act as a select vestry for the concerns of the poor of the same. The return further stated, that the rector of the parish, the churchwardens making the return, and certain parishioners therein named, at the time when the writ was received, were members of and constituted, and at the date of the return still were members of and constituted, the vestry of the said parish according to the custom; some of the last-mentioned parishioners having previously served the office of upper churchwarden, and the residue having, before they became members of such vestry, been duly elected by the greater number of the rector and parishioners members of vestry, in vestry parochially assembled.

*508] And that the duties(a) imposed *on select vestries by the act passed in 59 G. 3, to amend the laws for the relief of the poor, had immemorially been used and accustomed to be performed and executed in the said parish, and still were and continued so to be by the vestry so constituted by the said custom as aforesaid.

Prendergast was now heard against the return. This is, on the face of it, a bad return. It alleges that the duties imposed on select vestries by the statute 59 G. 3, c. 12, have been performed from time immemorial within this parish by the vestry as now subsisting. But some of those duties, as superintending the money raised by poor-rates, and directing the overseers of the poor in the execution of their office, are evidently created by the statute 43 Eliz. c. 2, and cannot have arisen before that time. The fund raised by poor-rates ought, by 43 Eliz. c. 2, to be managed by the officers there mentioned, namely, churchwardens and overseers; and the act 59 G. 3, c. 12, directs that the overseers shall be members of the vestries established under that statute: but this return states a custom to administer the poor-rates without overseers. In *Rex v. Woodman*, 4 B. & A. 507, where an ancient select vestry already existed for the management of the church and parish affairs, Lord Tenterden, C. J., was of *509] opinion, that the inhabitants might nevertheless *assemble and appoint a select vestry for the care and management of the poor, not interfering with any of the rights of the ancient vestry. It is true there is a provision, 59 G. 3, c. 12, s. 36, that nothing in that act shall extend to alter, affect, or disturb any select vestry established in any parish by ancient usage; but there cannot have been any usage for the superintending of poor-rates before the act 43 Eliz. c. 2, nor could such duty have been legally performed between that time and the passing of 59 G. 3, c. 12, without overseers. The return, therefore, cannot be true, and there ought to be a peremptory mandamus.

Platt, contrd. The return is sufficient. There is nothing, in the custom alleged, against common right; and although it is true that the management of the concerns of the poor according to the present system began under Queen Elizabeth, they may, consistently with common law and right, have been administered in a particular parish by a select vestry before that time, though not in the mode pointed out by 43 Eliz. c. 2. And if they were so managed from time immemorial, it follows of course that they could not have been superintended by overseers. In omitting them, the return is consistent with itself. In *Rex v. Woodman*, 4 B. & A. 507, the point decided was, that the ancient vestry were wrong in assuming to act under 59 G. 3, c. 12, and elect a new one. The opinion of Lord Tenterden, C. J., in that case, which has been relied upon, was only an obiter dictum. If that dictum were applied in the manner contended for, it would follow that there might be two select vestries *510] *in a parish, which cannot have been intended by the legislature. The declared object of 59 G. 3, c. 12, is the better execution of the laws for the relief of the poor; and in section 36 it is provided that that act shall not interfere with ancient select vestries. Such a provision would have been unnecessary unless ancient vestries had before that time exercised some authority in the management of the poor, with which the powers given by the new act might

(a) The duties imposed by 59 G. 3, c. 12, s. 1, upon the select vestries to be established in pursuance of that act, are as follows:—"And every such select vestry is hereby empowered and required to examine into the state and condition of the poor of the parish, and to inquire into and determine upon the proper objects of relief, and the nature and amount of the relief to be given; and in each case shall take into consideration the character and conduct of the poor person to be relieved, and shall be at liberty to distinguish, in the relief to be granted, between the deserving and the idle, extravagant, or profligate poor; and such select vestry shall make orders in writing for such relief as they shall think requisite, and shall inquire into and superintend the collection and administration of all money to be raised by the poor's rates, and of all other funds and money raised or applied by the parish to the relief of the poor; and where any such select vestry shall be established, the overseers of the poor are required, in the execution of their office, to conform to the directions of the select vestry, and shall not (except in cases of sudden emergency or urgent necessity, and to the extent only of such temporary relief as each case shall require, and except by orders of justices, in the cases hereinafter provided for) give any further or other relief or allowance to the poor, than such as shall be ordered by the select vestry."

conflict. A return to a mandamus need not be such as can be supported throughout; it is only necessary that enough should be established to excuse the parties from performance. It is not pretended in this return that the vestry has taken upon itself all the powers given by 59 G. 3, c. 12; nor, on the other hand, is it complained that they have failed to perform any duties which the parish requires from such a body.

LITTLEDALE, J.(a) I am of opinion, taking the whole of this return together, that it cannot be supported. The custom alleged, so far as it regards consulting and deliberating on things concerning the church, and the parish generally, is good; and I am not prepared to say that the custom to act as a select vestry for the concerns of the poor of the parish is objectionable. For although the first provision for the poor by statute was within legal memory, yet before the statute of Elizabeth there were modes in which the poor were provided for, by voluntary contribution of individuals, by the bounty of the monasteries, and in other ways; and the management of the relief thus afforded may, in any particular parish, have been intrusted to a select vestry, though not possessing any compulsory powers.

*But the return goes on to state that the vestry has, from time immemorial, performed the duties imposed on select vestries by the act 59 G. 3, c. 12. I admit that there are cases in which matters of recent origin may be brought under ancient customs, as it was held in *Wilkes v. Williams*, 8 T. R. 631, that an immemorial exemption for all officers of the Court of Chancery extended to persons filling newly created offices in that Court. But on looking into the statute 59 G. 3, c. 12, it is clear that the principle of that case does not apply here. There are certain duties expressly imposed by the act which cannot have been immemorially performed. The examination into the state of the poor, and inquiry as to proper objects of relief, may have been carried on before legal memory, and orders may have been made before that time for relief, out of such funds as then existed: but the vestry cannot have superintended the collection and administration of all money to be raised by the poor's rates, nor can they have given directions to which overseers could be required, in the execution of their office, to conform, till after the statute of Elizabeth. There are also enactments in other parts of 59 G. 3, c. 12, relating to the discharge of duty by select vestries, which are equally inconsistent with the supposition of such duty being performed before the act of Elizabeth; as in sect. 2, where power is given to justices to make an order (first summoning the overseers) in case of adequate relief being refused by the select vestry; the clause (sect. 6) for appointing non-resident overseers on the nomination and at the request of the vestry; and other provisions which it is unnecessary to go into, because it is sufficiently clear from the parts of the act *already mentioned that the custom relied upon is not truly alleged. [*511]

PARKE, J. I am of the same opinion. By the statute of 59 G. 3, the inhabitants of a parish have a right to establish a select vestry according to the provisions there made, except in certain specified cases; one of which is, where there is already in the parish a select vestry, established and acted upon by virtue of ancient usage or custom, and which vestry would be disturbed in its functions by the establishment of a new one. But supposing such a vestry to exist, with a control over the poor, it ought, in order to exclude the operation of the act, to have already as extensive powers for the regulation of the poor as the statute gives to new select vestries. And the present return states that the ancient vestry has immemorially performed all the duties imposed by the statute. Then the question is, looking at this statement, and comparing it with the statute, whether it can by possibility be true. Among the duties imposed by the statute is that of superintending the funds raised by poor's rates; and it is enacted that the overseers, in the execution of their office, shall conform to the direction of the select vestry, which is substantially a provision that the vestry shall make orders to be binding on the overseers. Now we know judicially that there were neither overseers nor poor-rates before the 43 Eliz. The ancient vestry may

(a) Lord TENTERDEN, C. J., had left the Court.

have had, from time immemorial, the power of applying and managing funds raised for the relief of the poor otherwise than by compulsory rates, and there is no reason that they should not continue to enjoy that authority, if existing. But it is also clear that the inhabitants are not precluded from exercising the *513] power of appointing a vestry to discharge *those functions, and very important ones they are, which arise out of the poor-law first established by the statute of Elizabeth. And this decision will agree with the opinion expressed by Lord Tenterden in *Rex v. Woodman*, 4 B. & A. 507.

TAUNTON, J. The parish has, *prima facie*, a right to that which is sought by the present mandamus. Then is any reason shown why they should not obtain it? The return states that the ancient vestry has been accustomed to act as a select vestry for the concerns of the poor; in what way, is not there specified; but it is afterwards said that the duties imposed on select vestries by 59 G. 3, c. 12, have immemorially been executed and still are so by the vestry constituted by custom as aforesaid. This, as an exposition of the mode in which the vestry has been accustomed to act for the poor, is manifestly untrue, because it is impossible they should have immemorially discharged some of the duties imposed by the act, which have been already pointed out. The return then cannot be supported, inasmuch as it discloses matter which we know judicially not to be true. No blame is to be imputed on this account to those who prepared the return, for it was impossible, under the circumstances, to make it tenable. With regard to the exception in sect. 36, if that could be understood as preventing the formation of a new select vestry in any parish where one had already existed, and exercised any superintendence over the concerns of the poor, it would follow that such a parish could not by possibility have a select vestry to carry on the management of the poor according to the provisions of the act. An ancient *514] vestry may perhaps have a concurrent *jurisdiction with one appointed by the statute, on some matters relating to the poor, as well as the power which has usually belonged to vestries in ecclesiastical and other parochial affairs, but that is not material to our decision on the present return.

Peremptory mandamus awarded.

GRYLLS *v.* DAVIES. *May 30.*

The servant of a party who had been bargaining for the purchase of a chattel, came to the owner and said that his master desired to look at it, and would keep it if approved of. The chattel was in consequence delivered to the servant, but was neither purchased nor returned. Trover was brought against the servant: Held, that the master was a competent witness to prove in defence, that the message had been delivered by his authority, and the chattel received and kept by him.

TROVER for a flute. At the trial before Clarke, C. J., at the Spring great sessions for Glamorganshire 1830, it appeared that something having passed between the plaintiff and a Mr. Brittan respecting a proposed purchase of the flute by Brittan, the defendant afterwards came to the plaintiff and asked him for the flute for Brittan to look at, saying that if he approved of it he would keep it. The plaintiff delivered the flute, but desired the defendant to bring it back immediately, which he said he would do. It was not, however, returned; the parties came to no terms as to the purchase, and the flute was demanded back and refused. For the defence Brittan was called to prove that the defendant was his servant, and that he had sent the defendant to ask for the flute for him, Brittan, to look at, and to say that if it was approved of he would keep it: that it was immediately delivered by the defendant to him, and that he had kept it ever since. It was objected to this evidence, that Brittan was an interested witness, as he might be called upon in case of a verdict for the plaintiff, to indemnify the defendant. The evidence was however received, and a verdict

found for the defendant. A rule nisi was obtained for a new trial, on *the ground that Brittan's evidence ought not to have been admitted. [*515]

Whitcombe now showed cause. The witness could not be incompetent unless the defendant acted in obedience to his commands. Then the question is, were the commands which he gave to the defendant lawful or not? If they were lawful, no tortious conversion could have taken place in obedience to them; and, therefore, if the jury found the defendant guilty of such conversion, the witness could not be liable in consequence of the commands given. If they were unlawful, the witness was not liable to indemnify the defendant, for there can be no contribution enforced between wrongdoers; *Merryweather v. Nixan*, 8 T. R. 186; *Stephens v. Elwall*, 4 M. & S. 259. *Paddock v. Fradley*, 1 Crompt. & Jerv. 90, where the master was held a competent witness for the servant, very much resembles the present case.

Maule, contra. If the master did not authorize the servant to deliver such a message as he in fact gave, the objection does not arise; but then the plaintiff ought to have had a verdict. It was opened, however, in defence, that the servant acted fairly in obedience to his master's direction. If so, the master, in proving the nature of that direction, was an interested witness, because if the message appeared to have been one which would operate as a deceit upon the plaintiff, the master was liable to the servant for any responsibility which might attach to him in consequence. He was answerable over to the defendant, not as a joint-wrongdoer, but on the general principle that where a party acting as the servant, *and for the benefit, of another, innocently does something by [*516] which he incurs responsibility, the person on whose account the thing was done is liable, not for contribution, but for indemnity. This was the ground of decision in *Langdon v. The African Company*.(a) [Lord TENTERDEN, C. J. The company had received the benefit of the act for which the executor was sued, and he sought relief against them in equity.] Such indemnity must necessarily be given, on account of the inconvenience which would follow, if a servant, whenever he had to execute commands of his master (not illegal or wrongful in themselves), by which the rights of other persons might be affected, were obliged to ascertain the master's title.(b) In *Paddock v. Fradley*, 1 Crompt. & Jerv. 90, the act complained of was a trespass, which distinguishes that case from the present. [PARKE, J. If a verdict could have gone against the defendant in this case, it would have been on the ground that he made a statement by which the plaintiff was deceived; how could the master be liable if he did not sanction that statement? LITTLEDALE, J. The case would then be like that put in *Southern v. How*, Cro. Jac. 468, by Houghton, J. "If one command his servant to sell an ill horse, and the servant sell him for a good one, whereby the servant is arrested and indamaged, yet the servant shall not have his remedy against his master."]

Lord TENTERDEN, C. J. As the case stood when the master was called, I think he was a competent witness; for if he proved that the defendant was authorized by him *to deliver the message which was in fact delivered, the plaintiff [*517] could not recover; if he proved that the defendant was charged with a different message, then a verdict against the defendant in this action would not have been evidence to support an action afterwards brought by him against his master.

LITTLEDALE, J., concurred.

PARKE, J. Objections to the competency of a witness should regularly be taken upon the voir dire, though the practice is not adhered to. Now the questions which would have been put to this witness upon the voir dire, to try his competency, would have been whether the defendant was his servant, and whether he had authorized him to make any representation (which might have been specified) calculated to deceive the plaintiff. And it is clear from the evidence which he in fact gave, that the answers to these questions must have shown that

(a) Cited, 15 Vin. Abr. *Master and Servant*, G. Pl. 5, from Ch. Prec. 221.

(b) See *Mires v. Solebay*, 2 Mod. 242.

he did not authorize any such representation, and consequently was not liable over to the defendant in the event of a verdict against him.

TAUNTON, J. If the witness could have been affected at all by the verdict, he stood indifferent between the parties; for, as the case is put on behalf of the plaintiff, if the verdict had gone against the defendant, the witness was bound to indemnify him on the ground of deceit in the message carried by him from his master; but on the other hand, the evidence of the witness, if it discharged the defendant, rendered himself liable.

Rule discharged.

***518] *The STRATFORD and MORETON Railway Company v. STRATTON. May 31.**

A company were empowered by act of parliament to carry on certain works, and the committee were authorized to make calls for money upon the proprietors, not exceeding 10*l.* per share, from time to time as they should find necessary, so that no calls should be made at the interval of less than two months from each other. None of the powers of the act were to be put in force till 33,500*l.* were subscribed. The committee began the works before that sum was subscribed, and made a single order, calling on the proprietors for several payments of 10*l.* each, to be made at intervals of two months.

A subsequent act recited, that the capital of 33,500*l.* had not been subscribed; that the company had proceeded in the works, incurred debts, &c., and that a certain sum was due from defaulters in the payment of calls. It provided for carrying on the works, and for making further calls; and it enacted, that the powers, &c., of the former act (except where expressly altered) should remain vested in the company, though the 33,500*l.* had not been subscribed.

In an action by the company against one of the committee, for money due on some of the calls made as above mentioned, others of which he had paid: Held, that the calls, being made all at one time, were irregular; that they were not ratified by the mention of them in the second statute, as it could not be presumed, in the absence of any expression to such effect, that the legislature, when passing that act, was apprised of their having been improperly made; and that the defendant was not estopped by having joined in making the calls, or by his payment of part of them, from disputing their validity; for that, the calls being against law, no person ought to have been misled into a compliance with them by the defendant's conduct or admissions.

THIS was an action of debt, tried before Lord Tenterden, C. J., at the sittings in London, after Trinity term 1829, when a verdict was found for the plaintiffs for 1000*l.*, subject to the opinion of this Court upon the following case:—

The plaintiffs are a company incorporated by statute 1 & 2 G. 4, c. lxiii., which was amended by 6 G. 4, c. clxviii. At a meeting, held on the 17th of September, 1822, the committee of the company, assuming to act by virtue and under the authority of the first-mentioned statute, made the following calls for money from the proprietors (*viz.*), 10*l.* per share to be payable on the 28th of October, 1822, 10*l.* per share to be payable on the 28th of December in the same year, 10*l.* per share on the 28th of February, 1823, 10*l.* per share on the 28th of April, 1823, and 4*l.* per share on the 28th of June, 1823; and notice of such

*519] calls was given by *advertisement in a county newspaper on the 5th of October, 1822.

At the time when these calls were made, and also at the times at which they were respectively payable, the defendant was a proprietor of forty shares, and he attended the meeting of the committee at which the calls were made, as a member of such committee, and joined in making them. The minutes of the proceedings at such meeting were read over to him at the time, by the secretary, and he approved of them: he also paid the full amount on his forty shares for the first two calls, at the times at which respectively such calls were made payable, but upon the subsequent calls under the first act of parliament, and also upon other calls made under the second act of parliament, he paid only so much money as made up, together with the sums previously paid by him, the full amount of the calls upon twenty shares, contending (on grounds not relevant to the question in the special case) that his liability was limited to that number of shares.

On the 17th of September, 1822, when the first-mentioned calls were made, the whole sum of 33,500*l.* had not been subscribed according to the seventy-fourth section of the first act of parliament. No objection was made by the defendant, before the trial of the cause, to the mode in which the calls were made, or to the authority of the committee, under the act of parliament to make them.

The material parts of the statutes above referred to were as follows. By 1 & 2 G. 4, c. lxiii., the company were empowered to raise among themselves 33,500*l.* for the purposes of the act, and an additional sum of 7000*l.* *if necessary, and from time to time to make calls upon the proprietors for money for the [*520 expenses of the undertaking and to carry on the same, as they should, from time to time, find necessary for those purposes; so that no such call should exceed 10*l.* upon each share which any person should be possessed of, and so that *no calls should be made but at the distance of two calendar months at the least from each other*, and that twenty-eight days' notice, at the least, should be given of all such calls, by advertisement in a newspaper. And it was further enacted, *that the whole sum of 33,500*l.* should be subscribed before any of the powers given by this act should be put in force.* By the recital of the act 6 G. 4, c. clxviii., it appeared that the sum of 33,500*l.* had not yet been subscribed; that the company had, in part, executed the railway and works: that a part of the subscriptions had been received, but that "the sum of 7851*l.* remained due from sundry subscribers who were defaulters in the payment of the respective calls, and from insolvent and bankrupt subscribers;" that money had been raised by mortgage (which the former act empowered the company to do), but that a large additional sum was still requisite, which it was proposed to raise by further mortgage, and by calls upon the proprietors. A part of the former act (as to making a collateral branch of road) was therefore repealed, but it was provided that the remainder of the statute, and all the powers, provisions, &c., therein should (except where expressly repealed or altered) stand good as if re-enacted. Sect. 20 gave the power of making any calls for the completing of the railway and payment of debts, not exceeding in the whole 15*l.* per share, in the manner afterwards mentioned. Sect. 26 contained the following clause:—

*"And whereas the several sums of money already advanced and expended on the said railway greatly exceed the sum of 33,500*l.*, the [*521 calculated expense in the said act (1 & 2 G. 4, c. lxiii.) mentioned; be it further enacted, that all and every the powers and authorities which were given by the said recited act, save and except such powers and authorities as are expressly repealed by this act, shall be and remain and the same are hereby vested in the said company, notwithstanding the whole of the said sum of 33,500*l.* has not been subscribed as required by the said act."

The case was now argued by

Jardine for the plaintiffs. Two objections are made to the plaintiffs' right to recover. First, that the calls made on the 17th of September, 1822, some of which this action is brought to enforce, were unauthorized by the statute then subsisting, inasmuch as they were made before the 33,500*l.* had been subscribed. Secondly, that they were irregular, not being made at the distance of two calendar months from each other. As to the first objection, the case of *The Norwich and Lowestoft Navigation Company v. Theobald*, 1 M. & M. 151, would be decisive against the plaintiffs if this case, like that, depended on a single act of parliament: but here the irregularity is cured by the second statute, 6 G. 4, c. clxviii., which recognises what has been done since the preceding act, and, among other things, the making of calls; for these are expressly referred to in the first section. This intention to ratify the proceedings already taken is clear *from the twenty-sixth section, which expressly continues all the powers and authorities of the company (except those specifically repealed), [*522 although the whole capital mentioned in the former act has not been subscribed. If the calls are not sanctioned by 6 G. 4, c. clxviii., all the other proceedings taken previously to that act for carrying on the work are also unauthorized. To the other objection it may be answered, first, that that also is cured by the latter

act of parliament; secondly, that although the calls were made by one and the same order of the committee, the act was substantially complied with, inasmuch as the payments were only to be made at intervals of two months; thirdly, that the defendant is estopped from taking this objection, having joined, as a committee-man, in making the calls, and having induced others to comply by paying the calls himself in respect of twenty shares. Where a person, in any transaction with another, has by deed or word admitted particular facts, and the other has acted upon such his admission, he cannot afterwards in a dispute with the same party, arising out of that transaction, deny the facts, though consistently with truth; as, where a man has represented a woman as his wife who was not so; or put in bail in a wrong name. [Lord TENTERDEN, C. J. He cannot contradict the admission for the purpose of undoing what has been already done; but you would carry the principle of estoppel farther.] In *Clarke v. Clarke*, 6 Esp. 61, the plaintiff, whose goods had been sold under a commission of bankrupt, brought trover for the purpose of trying the validity of the commission, *523] and on proof that he had recommended the *auctioneer who sold, it was held that he was estopped. [PARKE, J. From disputing the sale.] In *Like v. Howe*, 6 Esp. 20, where the bankrupt had canvassed for assignees, he was held to be estopped from disputing the commission. [PARKE, J. He could not contest the title of those whom he had caused to be made assignees.] *Watson v. Wace*, 5 B. & C. 153. [Lord TENTERDEN, C. J. There the bankrupt had availed himself of the commission to obtain his discharge out of custody, in which he was at the suit of the petitioning creditor.] In *Heane v. Rogers*, 9 B. & C. 577, the Court lays down the principle of estoppel thus: "There is no doubt but that the express admission of a party to the suit, or admissions implied from his conduct, are evidence, and strong evidence, against him; but we think that he is at liberty to prove that such admissions were mistaken or were untrue, and is not estopped or concluded by them, unless another person has been induced by them to alter his condition; in such a case the party is estopped from disputing their truth with respect to that person (and those claiming under him) and that transaction." Here the defendant, by making the calls, and himself complying with some of them, has induced other members of the company to make those payments which he now says, in his own case, ought not to be enforced.

Platt, contrd. The committee had only power to make calls, "as they should from time to time find necessary," according to the provisions of 1 & 2 G. 4, c. lxiii. The intention was, that the necessity of the calls should be considered *524] of from time to time. Here a number are *made at once, to be all paid within nine months. Suppose, by the expiration of that time, occasion had not been found for all the money, what was to be done with it? (Here he was stopped by the Court.)

Lord TENTERDEN, C. J. I think these calls were not regular according to 1 & 2 G. 4, c. lxiii. By that act the calls are to be made at intervals, and the committee are to judge, from time to time, of the necessity of making them. Here several are made at once, to an amount which may probably not become necessary in the time over which they extend, and if so, the residue must be lodged at a banker's, or placed elsewhere at the peril of the proprietors. I think it was not the intention of the act that they should be exposed to this hazard. But it is contended that the subsequent statute recognises these calls as valid. That statute takes notice, in the recital, that the whole sum of 33,500*l.* mentioned in the former act has not been raised, and, at the same time, that a part of the words has been completed. So far it clearly ratifies what has been done. It then states that a certain sum has been raised, but that 7851*l.* remain due from subscribers, who are defaulters in the payment of the respective calls. But it does not appear from this, that the legislature was informed in what manner the calls had been made. They would suppose that what was done had been done rightly. It is a strained construction to infer from such expressions as appear in the recital of this statute, that the legislature sanctioned

what it does not appear they even knew. The argument on the ground of estoppel might have applied if any person had been led astray by the conduct of the *defendant. But he is, in fact, one of a committee who have made certain calls not warranted by law, and in part paid them. Who- [*525 ever has paid those calls might have known that he was not obliged to do so; his paying them was his own fault, and no person has a right to allege that he was misled by the act of the defendant.

LITTLEDALE, J. I think it is impossible that these calls, originally made as they were, could be enforced. It is true the second statute dispenses with the provision of the first as to putting certain powers in force before the requisite capital shall have been subscribed, and authorizes further calls, although that sum is not yet made up. But the clause requiring the subscription to be completed before the powers are exercised is quite distinct from that which directs that the calls shall be made at two months' distance from each other, and the act dispensing with the first does not affect the second. It is said the defendant is estopped from availing himself of this latter clause. But, first, it is not shown that he has, by his conduct, induced any person to pay money, or do any other act in compliance with these calls. And, further, it seems to me that this is not a case in which the defendant could be estopped in the manner alleged. The case of a bankrupt who has taken advantage of a commission against him is very different: there it might be a doubt whether the party was really a bankrupt or not; his act might remove that doubt, and induce other individuals to place themselves in a situation which they otherwise would not have stood in; and it is reasonable that he should not *afterwards be admitted to impeach the validity of what is done in consequence of such conduct on his part. But [*526 in this case the act expressly says that such and such things shall not be done, except in a certain manner; it cannot, therefore, be contended here that the conduct of the defendant has misled other parties, and shall thus operate by way of estoppel, as in the case of the bankrupt, and enable the company to enforce calls which the statute says shall not be made.

PARKE, J. I think it is clear that the act 1 & 2 G. 4, c. lxiii., meant that the calls should be made from time to time as necessity arose. I agree to the doctrine in *Heane v. Rogers*, 9 B. & C. 577, that a party having made admissions by which another has been led to alter his condition, is estopped from disputing their truth with respect to that person and that transaction; but I think it does not apply here, where the question raised by the party supposed to have made the admission is one not of fact but of law. It appears to me also, that the second statute does not remove the objection as to the time at which the calls were made, for the legislature cannot be presumed to have known that they were all made at once, and not at the periods prescribed by the former act. And I think that the twenty-sixth section of 6 G. 4, c. clxviii., enacting that the powers of the preceding statute shall be and remain with the company, though the sum of 88,500*l.* has not been subscribed, has no bearing on this objection, for that it is prospective only, and not retrospective.

*TAUNTON, J. It is admitted that the calls, if judged of by the first statute only, are irregular, but it is said the subsequent act sets them up as valid. But as that act contains no clear, direct, and particular ratification of the calls, which in fact were made four years before, I think it cannot have the effect of rendering that order legal, which was illegal at the time it was made. It is also clear that the defendant was not estopped. It was not competent to him to dispense with the statute under which he and the rest of the committee professed to act, even for the purpose of rendering himself liable to be sued. The calls being contrary to law, it lies in his mouth to take that objection, though he was a party to their being made. Postea to the defendant. [*527

*528] *WHARTON, Esquire, v. KING. May 31.

Declaration stated, that differences had arisen between the plaintiff and defendant respecting certain liabilities of the plaintiff on account of the defendant, in respect of bills of exchange to which the plaintiff had put his name, and which the defendant had negotiated; that the plaintiff had commenced an action against the defendant on account of his having negotiated the same, and also for the recovery of the bills; and that by an order made in the said action, the cause and all matters in difference between the parties were referred to arbitration. That the arbitrator made his award, whereby he directed the defendant to pay the plaintiff 10s., and that the defendant should, at the same time, deliver up to the plaintiff a bill of exchange for 300*l.*, therein particularly described, or give the plaintiff a bond of indemnity; and further, that the defendant should, at the same time, pay the plaintiff 343*l.*, unless he, the defendant, should then pay what remained due upon a judgment recovered by A. and others against the defendant, in a certain action brought by the said A. and others against the plaintiff, as the drawer of a certain bill of exchange for 300*l.*, bearing date the 18th of May, 1826, drawn by defendant upon, and accepted by, one C. N., and payable to the order of the defendant, and by him endorsed to the said A. and others, and likewise cause satisfaction to be entered on the judgment-roll in such action; and likewise deliver up to the plaintiff the last-mentioned bill of exchange: And the arbitrator further awarded, that on performance of the award as *aforesaid*, the plaintiff and defendant should execute mutual and general releases.

Plea, first, that a bill of exchange, therein particularly described, had been drawn, endorsed by the plaintiff, and by him delivered to the defendant: and that the liability of the plaintiff, in respect of the same, was a matter in difference submitted to the arbitrator, and that he had not awarded concerning it.

Secondly, the like as to an action which was depending between the plaintiff and defendant at the time of the reference, and to divers other pecuniary matters, claims, and demands.

Thirdly, the like as to a judgment recovered by A. and others, against the plaintiff, which was unsatisfied at the time of making the award, and which it was disputed whether the plaintiff or defendant ought to satisfy.

Fourthly, that there never was any judgment recovered, or action brought, by A. and others against the defendant on any such bill of exchange drawn by the defendant, as was mentioned in the award, and that performance of the award as to such judgment was impossible.

Fifthly, that the defendant never had any authority from A. and others to cause satisfaction to be entered on the judgment-roll, in such last-mentioned action, and, therefore, that it was wholly out of his power to do so; nor was it in his power to deliver up to the plaintiff the bills of exchange in the award mentioned, and which were endorsed to and outstanding in the hands of other persons.

Upon demurrer; it was held,

That the first three pleas were bad, because the arbitrator, by having awarded mutual and general releases, must be deemed to have adjudged and finally decided upon the matters in those pleas respectively mentioned, and the general release would be an answer to any actions or claims founded upon them:

And, that the fourth and fifth pleas were bad, because, although it might be impossible for the defendant to perform certain parts of the award therein mentioned, yet the award in each instance gave an alternative which he could perform.

DECLARATION stated that differences had arisen between the plaintiff and the defendant, respecting certain liabilities of the plaintiff, for and on account of
*529] the defendant, in respect of certain bills of exchange *to which the plaintiff had put his name without any consideration, and which the defendant had negotiated; that the plaintiff had commenced an action in the King's Bench against the defendant, for damages, on account of his having so negotiated the said bills, and also for the recovery of the said several bills of exchange, which action, at the time of making the order next mentioned, was depending; and that afterwards, by an order of the Honourable Mr. J. Littledale, the said cause, and all matters in difference between the parties, were referred to the arbitrament of A. B., Esquire, so as he should make and publish his award in writing, of and concerning the matters referred on or before a day therein mentioned.

The declaration then stated mutual promises to perform the award, and averred that on the 8th of January, 1830, the arbitrator made and published his award of and concerning the matters referred to him, whereby he awarded that the defendant should pay to the plaintiff 10s. on the 1st of February then next, and that the defendant should, at the same time, deliver up to the plaintiff a certain bill of exchange for 300*l.*, bearing date the 7th of July, 1826, drawn by the defendant upon, and accepted by the plaintiff, payable six months after date to the defendant's order, and by him delivered before the same became due

to one A. Hunter; or instead thereof should, at the same time, give the plaintiff his bond for 600*l.*, conditioned to indemnify the plaintiff against all demands, loss or damage, by reason of the last-mentioned bill; and also that the defendant should, at the same time, pay to the plaintiff the further sum of 343*l.* 10*s.* unless he, the defendant, should, on the said 1st of February, pay and satisfy [*530] what remained unpaid upon a certain judgment theretofore recovered by W. Tottie, J. Richardson, and M. Gaunt, against the *defendant*,^(a) in the Court of King's Bench, in a certain action brought by the said Tottie, Richardson, and Gaunt against the *plaintiff*, as drawer of a bill of exchange for 300*l.*, bearing date the 18th of May, 1826, and drawn by the said *defendant* upon, and accepted by one Conyers Norton, payable six months after date to the order of the said *defendant*, and by him endorsed and paid away to the said Tottie, Richardson, and Gaunt; and likewise, at his own costs, cause satisfaction to be entered on the judgment-roll in such action; and likewise deliver up to the said plaintiff the last-mentioned bill of exchange. (There was a similar clause, which it is unnecessary to notice further, respecting a judgment in another action on bills of exchange.) And it was further awarded, that *on the performance of the said award, as aforesaid*, the plaintiff and defendant should, at the costs of the party requiring the same, execute and deliver to each other mutual and general releases of all actions, causes of action, and claims and demands whatsoever, down to the day of the said order of reference:—of which award the defendant afterwards had notice. Breach, first, non-payment of the 10*s.*; secondly, that the defendant, although requested, did not deliver to the plaintiff the bill of exchange for 300*l.*, or give his bond to indemnify the plaintiff; thirdly, that the defendant did not pay or satisfy what remained unpaid upon the judgment *recovered by Tottie [*531] and others against the plaintiff as the drawer of the bill for 300*l.*, nor cause satisfaction to be entered on the judgment-roll in such action, nor deliver up to the plaintiff the said last-mentioned bill; and that although the defendant, on the said 1st of February, was requested to pay the sum of 343*l.* 10*s.* in the award mentioned, yet he did not do so.

Pleas, first, that a certain bill of exchange, bearing date the 18th of May, 1826, had been drawn by the *plaintiff* on one Conyers Norton, for the payment, six months after date, to the *plaintiff's* order, of 300*l.*, and had been endorsed and delivered by the *plaintiff* to the defendant, and that the liability of the plaintiff as the drawer of such bill was a matter in difference between the plaintiff and defendant, referred and submitted to the arbitrator, and upon which he was requested by the defendant to award, but that he had not done so. Second plea, that a certain action commenced by the plaintiff against the defendant and depending in the King's Bench, and also divers other pecuniary matters, claims, and demands in law and in equity between the said parties, were matters in difference referred and submitted to the arbitrator, and upon which he was requested by the defendant to award, but that he had not done so. Third plea, that a judgment had been recovered by Tottie, Richardson, and Gaunt, in K. B. against the *plaintiff*, which was unsatisfied at the time of making the award; that whether the plaintiff or defendant should pay the money so recovered, and unsatisfied, was a matter in difference referred to the arbitrator, and upon which he was requested by the defendant to award, but he did not do so, nor had he by his award ascertained the sum recovered by or *remaining unsatisfied [*532] upon the said judgment. Fourth plea, that there never was any judgment recovered or action brought by Tottie, Richardson, and Gaunt against the *defendant* on any bill of exchange drawn by the *defendant*, bearing date the 18th of May, 1826, nor was there ever any such bill drawn by the *defendant*, and in those respects the award is founded on error; and the performance of those parts thereof which relate to such supposed bill and judgment is impossible. Fifth plea, that the defendant never had any lawful authority from Tottie, Richardson,

(a) The arbitrator by mistake inserted the word defendant instead of plaintiff. The bill was drawn by the plaintiff, payable to his own order, endorsed by him to the defendant, and by the defendant to Tottie, R., and G., who obtained judgment upon it against the plaintiff.

and Gaunt, or either of them, to cause satisfaction to be entered on the judgment-roll in the said action in the award mentioned to be brought by them; and that at the time of making the award, and ever before and since, it was wholly out of the power of the defendant to cause satisfaction to be entered on such judgment-roll, or to procure or deliver up to the plaintiff either of the said several bills of exchange in the award mentioned, and which had been and were respectively endorsed to and outstanding in the hands of other persons. Demurrer.

Miller in support of the demurrer. The first plea is bad, because the matter therein stated was disposed of by the award of general releases. It is immaterial whether the bill of exchange therein mentioned be specifically arbitrated on, provided the matter was under the arbitrator's notice (which the plea admits), and the award be sufficiently comprehensive to dispose of it. *Shelling v. Farmer*, 1 Str. 646. *Birks v. Trippet*, 1 Saund. 32, is expressly in point. Every intendment is to be made in favour of an award,

*533] and none against it. Here the plea states that the bill had been drawn in May 1826, by the plaintiff on C. Norton for the payment, six months after date, to the order of the plaintiff, of the sum of 300*l.*, and that it was endorsed and delivered by the plaintiff to the defendant. According to the plea, therefore, it was over-due three years in the defendant's hands. No possible legal liability could arise, except between these parties, and that would be extinguished by a general release. Then, as to the second plea, the action in which the present order of reference was made, is stated to have been brought in respect of certain bills endorsed away by the defendant, and the award directs 10*s.* to be paid to the plaintiff, and then certain judgments recovered on bills of exchange against the plaintiff are to be satisfied, or sums equal to the respective debts and costs are to be paid, and the plaintiff is to give the defendant a release of all actions and causes of action, &c. There is enough, therefore, looking through the award, to show that the whole has been determined, which is sufficient. *Jackson v. Yabsley*, 5 B. & A. 848. The third plea is bad, because it tenders an immaterial issue. It is perfectly irrelevant whether the matter there mentioned be expressly and specifically disposed of or not, if the words of the award are sufficient to comprehend it. Now, first of all the question as to the liability of the defendant to satisfy a judgment recovered against the plaintiff is disposed of by the award of mutual and general releases. The judgment recovered is against the plaintiff alone. He alleges against the defendant that he is bound

*534] to pay off this judgment. The arbitrator says that the defendant shall *discharge the plaintiff's liability in respect of the judgment (which was evidently upon one of the bills of exchange in question); and that the plaintiff shall give him a release from all claims. That release extinguishes for ever any claim on this judgment, and no assignment of it can raise any other liability. Secondly, the question as to the liability on these judgments is disposed of, because they are included in the present action. The declaration shows that the action was brought to recover damages for the consequences to the plaintiff of the defendant having negotiated certain bills; and the award shows that some of those consequences were actions upon those bills, in which judgments were recovered. The Court, therefore, may reasonably intend these judgments to be included in the grounds of action. Then, as to the fourth plea, that there never was any such judgment recovered by Tottie, R., and G. against the defendant as stated in the award, and, therefore, that the performance of the award as to such judgment was impossible: that plea is bad, because, as the award gives the defendant an alternative option of doing two things; the plea raises an immaterial and irrelevant issue, and puts in issue matter of law. The award in reality does not mean to say that there were any such judgments recovered, or any action against the defendant, or any bills drawn by the defendant; that is a mere clerical error. And, suppose this direction to be an impossible thing, it does not vitiate the remainder of the award, *Alder v. Saville*, 5 Taunt. 454; and as the *535] plea goes to the whole count, it is bad; but besides, there is an alternative which is both possible and certain, namely, *the payment of the 343*l.* 10*s.* :

and if an award direct one of two things to be done, and either of the two is uncertain or impossible, it is incumbent on the party to perform the other. *Lee v. Elkins*, 12 Mod. 585, *Simmonds v. Swayne*, 1 Taunt. 549. This last answer applies also to the fifth plea.

Lawes, Serjt., contra. The first three pleas are good. Here it was a condition of submitting to the award, that it should be made on all the points referred. The pleas allege that the matters therein mentioned were matters submitted to and not decided by the arbitrator, and that allegation is admitted by the demurrer. Those pleas, therefore, show that the award is not final, *Bradford v. Bryan*, Willes, 268, *Randall v. Randall*, 7 East, 81, *Ingram v. Milnes*, 8 East, 445, *Mitchell v. Staveley*, 16 East, 58. [Lord TENTERDEN, C. J. In *Birks v. Trippet*, 1 Saund. 32, the Court was of opinion that the arbitrator by awarding mutual releases had adjudicated upon matters not mentioned specifically in his award.] That was not the point decided, for the plaintiff in that case having demurred to a plea which called in question the validity of the award, *Saunders* for the defendant objected to the declaration, that the promise being to pay a collateral sum on request, an actual request was necessary before action brought, and should have been specially averred; and upon that ground judgment was given for the defendant. The case is always cited for that point, and not to show that an award of general releases is a decision of every *specific matter submitted to the arbitrator. Besides, in that case the releases were to be [*536] executed upon the payment of a specific sum of money by the defendant to the plaintiff. Here the arbitrator directs that on the performance of his award *as aforesaid*, the parties shall execute to each other mutual and general releases. Either party's title to require a release might depend upon what remained unsatisfied upon Tottie's judgment, and that is left uncertain by the award. Would a plea of full payment and satisfaction by payment of a certain sum upon the judgment have been good in this case as to the 343*l.* 10*s.*? and might not the plaintiff have replied that more was due; and if so, the award is not rendered final in this respect by the releases. Or, suppose, in an action brought by the defendant against the plaintiff for not giving a release on request, performance of the award by the defendant was averred, and payment of a specific sum as being all that was due upon the judgment, could not the present plaintiff, in defence to such an action, plead that more was due? Besides, the performance of some parts of the award is impossible. The defendant, therefore, never could entitle himself to a release. The matter omitted by the arbitrator, as stated in the third plea, was not respecting a mere debt from one party to the other, as in *Birks v. Trippet*, but regarded the liability of the defendant to satisfy a judgment recovered against the plaintiff. [PARKE, J. The defendant could only be bound to satisfy a judgment recovered against the plaintiff by reason of some contract, and a general release would discharge him from any action on that contract.] The plaintiff being *prima facie* liable on the judgment, the question sub- [*537] mitted to the arbitrator was, whether the defendant was bound to indemnify him. [PARKE, J. If the plaintiff had executed a release of all actions and causes of action, suits, bills, bonds, debts, covenants, *claims* and *demands* whatsoever, could there be a doubt that it would have put an end to every claim upon the defendant as to these judgments?] In *Pope v. Brett*, 2 Saund. 292, an award directed that A. should pay B. the money due for "task-work and day-work;" that B. should pay A. 25*l.*; and thereupon that general releases should be given mutually; and it was held that the uncertainty of that part of the award which had reference to the task-work and day-work vitiated the whole; since from its being void in that particular, B. would be deprived of what was to form a consideration for the 25*l.* to be paid, and the general release to be executed by him. So in this case, the releases are only to be given on the performance of the award *as aforesaid*, that is, on performance of every part of the award; and a part of the award is, that the defendant shall pay the plaintiff 343*l.* 10*s.* unless he shall before the 1st of February pay what remains unsatisfied upon a judgment recovered by Tottie, and likewise cause satisfaction to be

entered on the judgment-roll. It would not have been sufficient, therefore, if the defendant had got satisfaction entered on the roll, unless it could be shown that he had paid what was due on the judgment; and what that was, might afterwards be a matter of dispute. [Lord TENTERDEN, C. J. If he had got satisfaction entered *538] that would have been evidence that he had paid what was due. PARKE, J. At any rate, *he might release himself from all uncertainty by paying 348l. 10s.] That might be inserted as a penalty; the debt might be less than that sum. The fourth plea is good, because it shows that the award is not according to the submission, and that there is an error of fact on the face of it, which renders performance impossible. If this were a mere clerical mistake, it should have been so stated in the declaration. An award which is legally impossible is void, *Alder v. Savill and Others*, 5 Taunt. 454, *Harris v. Curnon*, 2 Chitty's Rep. 594; and the impossibility affects any claim to releases. The fifth plea is good for the same reasons.

Miller in reply. The demurrer admits those facts in the plea only which are well pleaded. If the award of general releases amount, in point of law, to a decision by the arbitrator of the several matters mentioned on the plea, then it is not well pleaded that there were matters submitted which the arbitrator has not decided. The demurrer, therefore, does not admit the truth of that allegation.

Lord TENTERDEN, C. J. I am very glad that the case of *Birks v. Trippet*, 1 Saund. 32, enables us to give judgment in favour of the plaintiff according to the law, as it undoubtedly will be according to the justice of this case. The first plea states, that a certain bill of exchange, bearing date the 18th of May, 1826, had been drawn by the plaintiff on one C. Norton for payment, to the order of the plaintiff, of 300l., and that that had been endorsed and delivered by the plaintiff to the defendant, and that the liability of the plaintiff as drawer of *539] the *bill to pay it, was a matter in difference between the plaintiff and defendant, and referred and submitted to the arbitrator, and that he had not made any award on the subject. To this plea, there is a general demurrer, and it is said that, by that demurrer, the plaintiff has admitted the fact alleged in the plea, that the arbitrator had not awarded concerning that matter in difference. Now, in *Birks v. Trippet*, which was an action of assumpsit upon an award, whereby the arbitrator directed the defendant to pay 6l. to the plaintiff, and that upon payment of that sum the parties should execute to each other general releases, the defendant pleaded in bar "that the plaintiff was indebted to him, being an attorney, in 4l. for fees and expenses, and before the making of the award he gave notice thereof to the arbitrator, and offered to make it appear to him, and prayed he would allow it in his award; but the arbitrator made his award without any allowance or consideration of the said 4l., notwithstanding such notice and proof;" and to this plea there was a demurrer, as in the present case. The argument was, "that the award was good, because the arbitrator had awarded general releases from both parties; and although the defendant had notified his debt to the arbitrator, yet the arbitrator was not bound to allow it, for perhaps he did not deem it to be a just debt, and therefore did not allow it; and the arbitrator was the judge of it, and had given his judgment that the plaintiff should be released by the defendant, and so he had made his award thereof, and of all other differences whatsoever; and of such opinion was the Court." The opinion so given by the Court is an authority to show, that by the award of general releases in this case, *540] the arbitrator must be deemed to *have taken into consideration the matter mentioned in the first plea, and that the defendant is entitled to judgment on the demurrer to that plea. The same observation applies to the second plea. The award has undoubtedly put an end to the action; for the arbitrator has not only ordered money to be paid, but a general release, which would clearly put an end to it. As to the third plea, the liability of the defendant to satisfy any judgment recovered against the plaintiff could only arise from contract, and a general release would be an answer to any action on such contract. Then, as to the fourth plea, which states that the performance of a part

of the award is impossible, supposing that to be so, the answer is, that the alternative is possible and certain, viz., the payment of a sum of money, and that being the case, the defendant is bound to perform the thing which is possible. The same observation applies to the fifth plea. The plaintiff is therefore entitled to judgment on all the pleas.

LITTLEDALE, J. I am of the same opinion. *Birks v. Trippet* shows that the award of releases amounts to a determination by the arbitrator as to the bill mentioned in the first plea, and the action mentioned in the second. As to the question whether the plaintiff or defendant were liable upon the judgment mentioned in the third plea; considering the nature of this reference, and that the differences had arisen (as is said in the declaration) respecting liabilities of the plaintiff on account of the defendant, in respect of certain bills of exchange to which the plaintiff had put his name, and which the *defendant had [*541] negotiated; and that, the judgment mentioned in that plea having been given against the plaintiff, the question was, whether the plaintiff should satisfy that judgment, or the defendant, for him; we must intend that there was some contract to render the defendant liable to satisfy the judgment so recovered against the plaintiff, and whatever that was, a general release would operate as a discharge from it. As to the objection taken to the award on the fourth and fifth pleas, that it was impossible, or out of the power of the defendant, to perform it, the answer is, that he may relieve himself from all uncertainty by payment of a stated sum.

PARKE, J. I am also of opinion that there ought to be judgment for the plaintiff. Many of the objections to this award are founded upon that which is manifestly a clerical mistake, the insertion in the award of the word *defendant* instead of *plaintiff*. The objection taken to the award by the first plea is, that a question as to the liability of the plaintiff as drawer of the bill therein mentioned, was submitted to and not decided by the arbitrator; but the award of mutual and general releases is a final decision of that question, and a complete adjudication upon it in point of law. That was the first point decided in *Birks v. Trippet*. Then as to the second plea, the same answer applies: the arbitrator by the award of general releases has put an end to the action there mentioned, and all other claims and demands both at law and in equity. The general release might be pleaded to the action either in bar or *puis darrein continuance*, or taken advantage of *by *auditâ querelâ*. Then as to the third plea, the [*542] question submitted whether the defendant was bound to indemnify the plaintiff against the judgments mentioned in the said plea could only arise from some contract by the latter to indemnify. If so, a general release would put an end to all questions upon such contract; for it would operate as a discharge from all contracts, executory or executed. The award therefore decides that question. Then as to the fourth plea. If there never was any such judgment recovered against the defendant as is therein mentioned, that was not a matter referred, but still the award would only be bad as to that. Then it is said that, as there was no such judgment as that mentioned in the award, it was impossible for the defendant to pay any sum due on such judgment, or cause satisfaction to be entered on that judgment-roll. Assuming that to be so, he might have paid the sum awarded by the arbitrator. That disposes of the fourth as well as of the fifth plea. The decision of the Court as to mutual release in *Birks v. Trippet*, appears not to have been adverted to in *Mitchell v. Staveley*, 16 East, 58; and in the latter case it did not clearly appear, by the seventh plea on which the judgment proceeded, that mutual releases were awarded, and, at all events, the attention of the Court was not directed to that point. *Birks v. Trippet* does not decide that an award of mutual releases would be an adjudication of a collateral matter not arising out of any contract between the parties to the submission, but that it is an adjudication of any claim resulting from such contract. The judgment of the Court must be for the plaintiff.

TAUNTON, J., concurred

Judgment for the plaintiff

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*SIMSON v. MOSS. June 1.

A hawker's license does not give the privilege of selling goods in a borough, where by a by-law made pursuant to charter and ancient custom, strangers are not permitted to trade.

THIS was an action of debt brought by the chamberlain of the borough of Hertford, against the defendant, for trading in the said borough without being free of the same, or authorized or empowered by act of parliament so to do, contrary to a by-law of the borough, made agreeably to ancient custom and by virtue of a charter granted to the burgesses and inhabitants by King Charles the Second. The defendant pleaded a license duly obtained by him, under the several statutes in that case made and provided, to trade as a hawker and pedlar. Demurrer and joinder.

F. Pollock was now to have supported the plea. But,

Per Curiam. This plea cannot be maintained. The act 8 & 9 W. 3, c. 25, which was the first statute for licensing hawkers, contained an express provision (s. 17) that nothing in that act should extend to give power to any hawker to sell wares or merchandises in any city, borough, town corporate, or market town, within this realm, otherwise than might have been done before the act passed. That clause has been omitted in subsequent acts, and it was not necessary it should have been inserted; for the legislature could not be supposed to intend that the granting of a hawker's license should give the franchise of trading in all corporate towns throughout the realm. Judgment for the plaintiff.

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*HILL v. The Proprietors of the MANCHESTER and SALFORD Water Works. June 1.

An obligor sued on a bond reciting a certain consideration, is estopped from pleading that the consideration was different, unless he can make it appear by his plea that the real transaction was fraudulent or unlawful.

Where a company, authorized by act of parliament to raise money for certain purposes, has given a bond purporting to be for a sum borrowed and advanced conformably to the act, it is not sufficient for them to plead to an action on such bond, that it was executed colourably, and that the money was not in fact borrowed or lent for the purposes of the statute, as the obligee well knew; the pleas not disclosing any fraud, or injury done to the shareholders in the company. By a clause empowering such company to raise money by bonds, it was enacted, that every holder of them should be equally entitled to a claim or lien on the rates and sums of money to be taken by virtue of the act, in proportion to the amount advanced by such holders, as if the same had been advanced upon mortgages or annuities also grantable by the act, "without any preference by reason of the priority of date of any such securities, or on any other account whatsoever:" Held, that an individual bondholder might sue the company upon his own bond, though there were other bonds, mortgages, &c., unsatisfied; the lien given by the act being only an additional security.

DEBT on two bonds, each in the penal sum of 200*l.*, bearing date the 13th of August, 1813, and 21st of December, 1814. By the condition of the first-mentioned bond, which was set out on oyer, it was recited that the company were, by an act of parliament (53 G. 3, c. xx.), authorized to raise, in addition to certain moneys already raised by them under a former act (49 G. 3, c. cxcii.), any sum or sums of money not exceeding 100,000*l.*, in such proportions as they should think fit, and for such purposes as in the first-mentioned act were expressed, by mortgage on the undertaking, or annuities to be charged thereon, or, if they should think it more expedient, by bonds or promissory notes under the seal of the company, payable with interest, and with or without power in the holder to have an option of being admitted to hold a share of 100*l.* in lieu of their principal money or such part thereof, not less than 100*l.*, as should be agreed on. The condition then stated a resolution of the company, for the purpose of raising part of the money authorized to be raised by 53 G. 3, c. xx., to

issue bonds for 100*l.* each, bearing interest, and payable in five *years, with option to the holder, at the end of that time, to take a share of 100*l.* in the stock of the company in redemption of his bond, or to be paid in money. It then proceeded, "And whereas the said Samuel Hill" (the plaintiff) "bath this day paid and advanced to the said company of proprietors the sum of 100*l.*, upon the terms in the said resolution mentioned, as they do hereby admit, now the condition of the above-written obligation is such," &c. The condition was, that at the end of five years the plaintiff should, at his option, be repaid his principal, or admitted a proprietor of one share of 100*l.*; and that in the mean time he should be paid 5*l.* a year interest. The condition of the second bond was similar, except that this bond was given for eighteen months only.

The defendants pleaded, as to the first bond, several pleas. The fifth stated, in substance, that the company was incorporated by the act 49 G. 3, c. cxvii., for the purposes in that act mentioned, and for no other, and was the same company as is mentioned in 53 G. 3, c. xx.; and that the bond was made and executed by them under colour of borrowing thereupon the sum of 100*l.* for the purposes in the last-mentioned act specified in that behalf, pursuant to the provisions in the same relative to the borrowing of money by the company on bond; but that, in fact, they did not borrow the said sum of 100*l.*, or any other sum, upon the said bond, from the said Samuel Hill, or from any other person, for the purposes in the same act contained, as the said Samuel Hill at all times hitherto well knew; nor did the said Samuel Hill, or any other person, lend the company the said sum of 100*l.*, or any other sum, upon the said bond, for the purposes in the last-mentioned act specified, as the *said Samuel Hill at all times hitherto well knew; wherefore the said writing in the said [*546 declaration first mentioned was and is wholly void.

The sixth plea, relating to the same bond, stated, that it was made and executed by the company, with the intent of borrowing 100*l.* thereupon for the purposes specified in the act 53 G. 3, c. xx., pursuant to the provisions in that act as to raising money on bond; that the company did borrow of the plaintiff the said 100*l.* on the security of the said bond, and executed and delivered the same to secure that sum and interest, as in the condition was mentioned; and thereupon the plaintiff became, and still was, entitled to all the privileges and benefits of a claim or lien on the rates and sums of money in the last-mentioned act referred to; that the company had in like manner borrowed divers large sums of money from other persons on bond, for the purposes of, and pursuant to the last-mentioned act, which bonds were still unsatisfied, and which persons were also entitled to a lien on the said rates and sums in the act mentioned; and that the company had also executed mortgages on their undertaking and works to a large amount, pursuant to the last-mentioned statute, and that the sums borrowed on such mortgages were still due. There were two pleas, the tenth and eleventh, as to the other bond, precisely similar to these.

The fifth and tenth pleas were specially demurred to, on the ground that the defendants were estopped from pleading the matter therein alleged, by their own acknowledgments in the conditions of the respective bonds. To the sixth and eleventh pleas there were general demurrers. The defendants joined in demurrer.

By the statute 49 G. 3, c. cxvii., the company was *incorporated for the purpose of making, completing, improving, and maintaining water [*547 works, aqueducts, reservoirs, and other works necessary for affording a sufficient supply of water to the inhabitants of Manchester and its neighbourhood, as in the recital of the act was particularly mentioned; and they were authorized (by sect. 3) to raise money for putting the act in force. The act 53 G. 3, c. xx., s. 1 (reciting the former statute), provided as follows:—

"That it shall and may be lawful to and for the company of proprietors of the Manchester and Salford Water Works to raise and contribute among themselves, for the purposes of the said recited act, in addition to the money which has already been raised by them under the powers of the said recited act, for the purposes thereof, any sum or sums of money, not exceeding in the whole the

sum of one hundred thousand pounds, in such proportions as they shall think fit; and which said sum of money, when raised, shall be laid out and applied by the said company of proprietors, in the first place, in discharging the expenses of obtaining and passing this act, and reimbursing to the proprietors of the said undertaking all such sum and sums of money as shall have been advanced and paid by them, or any of them, for the purposes of carrying the said recited act into execution, and paying all such sum and sums of money as the said company of proprietors are now liable to pay, or to be called on for the like purpose, and for otherwise carrying the purposes of the said recited act and of this act into execution."

The said sum of 100,000*l.* was to be raised by new shares, or by mortgage or annuities; and with respect to such mortgages it was provided by sect. 3, *548] that all *mortgagees should be equally entitled to the respective portions of the moneys and premises assigned to them, according to the sums advanced, to secure the repayment of such sums and interest, without any preference by reason of priority of mortgages, or on any other account.

By sect. 10 of the same act, the company were also empowered to raise money by bonds or promissory notes, as stated in the condition of the bond first mentioned in this case. With respect to these it was provided as follows:—"And the rates and sums of money authorized to be taken, and which shall arise and be taken by virtue of this act, shall be security for any sum or sums of money so to be borrowed as last aforesaid, with interest, to the person or persons who shall from time to time be entitled to such securities, and the principal money and interest thereby secured; and all persons to whom any such securities as aforesaid shall be given, shall be equally entitled to a claim or lien on the said rates and sums of money, in proportion to the respective sums mentioned thereby to be secured and advanced, as if the same were advanced upon mortgages or assignments of the said rates, or in the purchase of annuities in pursuance or by virtue of this act, and without any preference by reason of the priority of date of any such securities, or on any other account whatsoever."

But in support of the demurrers. The fifth and tenth pleas are bad, because the defendants are estopped, by their own recitals in the bonds to which those pleas relate, from alleging that the sums in question were *549] not lent to them by the plaintiff for the purposes of the act *53 G. 3, c. xx. In *Shelley v. Wright*, Willes, 9, an obligor, who in the recital of a bond had admitted the receipt of moneys due to the plaintiff, the obligee, was held to be estopped from pleading that he had not received such moneys as due to the plaintiff. The same doctrine was held in *Rowntree v. Jacob*, 2 Taunt. 141, though a strong suspicion was raised of fraud in the obligee. *Hosier v. Searle*, 2 B. & P. 299, *Lampon v. Corke*, 5 B. & A. 606, and *Baker v. Dewey*, 1 B. & C. 704, also show that where a party has expressly admitted a fact under his hand and seal, he is estopped from disputing that fact. So in *Com. Dig. Estoppel* (A 2), it is said that in all cases where the condition of a bond has a reference to any particular thing, the obligor shall be estopped to say that there is no such thing. Authorities to the same effect are given in 1 Wms. Saund. 215, n. 2. In the present case the condition of each bond does expressly state a particular fact, and the obligors cannot now contradict it. As to the sixth and eleventh pleas, the argument on the other side must be, that no action at all can be brought upon the bonds, so as to give one obligee precedence of the others. This must be collected, if at all, from the tenth section of 53 G. 3, c. xx. But by that section the bonds may be given, payable at such times as the company think fit; and if one be payable in the present year, and another ten years hence, it cannot be the meaning of the act that the first shall not be put in force till the second is due. *Doe dem. Banks v. Booth*, 2 B. & P. 219, is the same in principle with this case. There it was provided, by a turnpike act, that all *550] mortgagees of the tolls, &c., should be creditors upon them *in equal degree, and should have no preference in respect of the priority of any money advanced: and it was held, that a mortgagee of part of the tolls, and of

the toll-houses, might bring ejectment for the toll-houses, in order to recover interest due to him, though there were other mortgagees unsatisfied. The lien given by 53 G. 3, c. xx. s. 10, is only an additional security, and does not interfere with the right of action. [PARKE, J. The lien is upon the rates and sums of money to be taken by virtue of the act. The company might have other property liable in case the plaintiff should recover in an action.]

Coltman, contra. The cases undoubtedly establish that where a fact is once agreed upon between two parties by their solemn act and acknowledgment under seal, it shall not afterwards be called in question by either. But an exception must be made if the effect of such estoppel would be the accomplishment of a purpose which the law does not allow. Since the case of *Collins v. Blantern*, 2 Wils. 347, it has always been held (as, particularly, in *Paxton v. Popham* and *Macarthur*, 9 East, 408), that an obligor may plead facts inconsistent with what appears on the condition of the bond, to show that it was given upon an illegal consideration. The question, therefore, in this case, is, whether the company could legally borrow money under colour of fulfilling the purposes of the act which authorizes such borrowing, but really for other purposes. [Lord TENTERDEN, C. J. The plea does not state that. It merely puts the negative, that the money was not borrowed for the purposes of the act.] The averment that the plaintiff did not lend, *nor the company borrow, the money for the purposes of the act, as the plaintiff well knew, is sufficiently precise. The material allegation is [*551 the negative one, that the money was not raised for the legitimate purposes. To state the objects for which it was raised would only have been an argumentative denial. Enough appears on the pleas to show a fraud which will vitiate the bonds. The powers acquired by a company under such an act as this, and the terms upon which they are to be exercised, are a bargain between the proprietors and the public; and if the company violate that bargain to the injury of those who have advanced money, and look to the undertaking for payment, it is, so far, a fraud upon the public. [Lord TENTERDEN, C. J. It should, then, have been stated or shown by the pleas that the borrowing was in fraud of those who had previously advanced money on the undertaking. PARKE, J. The argument for the defendants must be, that the bonds were illegal unless given in actual repayment of money advanced. Suppose they had been given by way of securing payment to a person who had to do, or who had done, work under the provisions of the new act. If the proprietors had given the bonds at once for these purposes, instead of giving them to raise money to be applied to such purposes, it could not have been said to be a fraud upon the act. And this is not inconsistent with the pleas. To make out fraud, it ought to have been shown that the bonds were given without consideration, or for a consideration quite beside the purposes of the act. Lord TENTERDEN, C. J. Neither fraud nor injury appears by these pleas.] As to the sixth and eleventh pleas, the act 53 G. 3, c. xx. s. 10, puts these bonds upon the same footing with the mortgages mentioned in sects. 2 and 3, *and clearly expresses the intention that no person shall obtain a preference by the priority of date of any security held by him. [*552 This would be defeated, if the bonds could at any time be enforced by action. The effect of the clause is, that all parties holding the bonds or notes there mentioned shall equally have a lien on the rates and moneys to be raised, and that shall be their security.

Lord TENTERDEN, C. J. I am of opinion that the plaintiff is entitled to judgment on both the points raised by these demurrers. As to the fifth and tenth pleas, I am not prepared to say that the company might not have been liable upon these bonds, even if they had been given without any view to the purposes expressed by the act; but the pleas do not raise that question. If the defendants meant to insist that the bonds were given for purposes unsanctioned by the act, and also prejudicial to the shareholders and mortgagees, that ought to have been shown. The pleas, as framed, lay no sufficient ground for the argument of illegality. For that purpose they ought to have gone much farther.

LITTLEDALE, J. These pleas might have been an answer to the plaintiff's

action, if they had shown that the bonds were given in consideration of some act which was immoral, or contrary to act of parliament or public policy; as in the cases of *Collins v. Blantern*, 2 Wils. 847, and *Paxton v. Popham*, 9 Wils. 408, or where defendants have shown the consideration of a bond to be usurious. So *553] here, if it had appeared that the bonds were given to *the plaintiff fraudulently and with intent to place in his hands a better security than he was by law entitled to, and that the plaintiff conspired for that purpose with the parties executing the bonds, they would have been bad, and the ground of action would have failed. But this defence does not arise upon the pleas. As to the effect of the tenth section upon the plaintiff's right to recover, it is true that section gives a lien to holders of bonds; but still the bond is a security of itself, and may be so enforced.

PARKE, J. I am also of opinion that the pleas are insufficient. To establish a case of fraud, much more should have been stated. It was for the company, if they disputed their liability, to open the estoppel arising from their own admissions, by showing that the consideration of the bonds was illegal, or inconsistent with the statutes under which they acted; or that there was no consideration. But that would not be so, if, for instance, the company had given these bonds by way of payment to a person who had executed works for them under the second statute, instead of raising money by bonds for the purpose of paying such person. And this case is not excluded by the fifth and tenth pleas. As to the sixth and eleventh, the lien given by 53 G. 3, c. xx. s. 10, is an additional security to the holders of bonds, but does not convert the bond into a mortgage.

TAUNTON, J. I am of the same opinion as to all the pleas. *Shelly v. Wright*, Willes, 9, is a clear authority to show that a party is estopped by his own recital *554] of a particular *fact in a deed; and although there is an exception where fraud or an illegal purpose can be shown, the pleas here do not bring the case within it. Judgment for the plaintiff.

DOE dem. WILLIAM KEEN v. MATTHEW WILLIAM WALBANK and SUSAN ARABELLA, his Wife. *June 1.*

Testator devised to trustees and their heirs, certain premises described in his will, upon trust, to permit his daughter to enjoy the same, and take the rents during her life exclusively of her husband; and from and after her decease, upon trust to the use of such child or children, and for such estate as she, notwithstanding her coverture, should by any deed or will appoint; and for want of such appointment, then to the use of the heirs of her body; and for default of such issue, to his own right heirs for ever. Then, after devising several other lands to the trustees in the like terms, he concluded thus: "And I hereby will, &c., that the said trustees, and each of them, shall, may, and do, in every respect, give receipts, pay money, and *demise the aforesaid premises*, or any part thereof, as shall be consistent with their duty and trust, or otherwise." Held, that the trustees took a fee simple in the lands devised to them.

EJECTMENT. At the trial before Littledale, J., at the Spring assizes for the county of Devon, 1829, a verdict was found for the lessor of the plaintiff, subject to the opinion of this Court on the following case:—

Edward Whitefield, late of Moretonhampstead, in the county of Devon, attorney at law, the great grandfather of the lessor of the plaintiff, being before and at the time of his death, seised in fee of a messuage called Steward, and several fields and closes called Northmore, Langhills, Pitt Parks, Ditch Parks, Beera, and a messuage in Ford Street, in which the said Edward Whitefield lived at the time of his death, devised (amongst other things) as follows:—"Also I give and bequeath unto Catherine Whitefield, my wife, and her assigns, for and during the term of her natural life, all that my messuage and tenement, with the appurtenances, called Steward, and the fields called Northmore, Pitt Parks, and *555] Ditch Parks, with their appurtenances, and the rents and profits thereof, *situate in the parish of Moretonhampstead aforesaid; and from and after

the death of my said wife Catherine Whitefield, I give, devise, and bequeath unto Henry Rundle the younger and W. Tozer, *and their heirs*, all that the said messuage, tenement, fields, and premises last mentioned, with their appurtenances, and the reversions and remainders thereof, and all my estate and interest therein; to hold to them, their heirs and assigns, upon the trusts and for the purposes following; i. e. upon trust and to the intent that they, my said trustees, shall permit Ann Whitborn, my daughter, to hold the said premises, and take and receive the rents and profits thereof to and for her own use and benefit during her natural life, exclusive of Thomas Whitborn, her husband; and from and after her decease, upon trust and to the use of such child or children of the body of my said daughter, Ann Whitborn, or of such grandchild or grandchildren of my said daughter, and his, her, or their heirs, and for such estate and estates as she the said Ann Whitborn, notwithstanding her coverture, and whether sole or married, shall by any deed or will which it shall and may be lawful for her to make (her coverture notwithstanding) appoint; and for want of such appointment, then to the use of the heirs of the body of my said daughter, Ann Whitborn; and for default of such issue, to my own right heirs for ever."

The testator then devised to the same trustees and their heirs his houses in Ford Street in Moretonhampstead, and a messuage called Willway, and his moiety of Langhills, upon the trusts and for the purposes following; i. e. upon trust to permit his daughter, Ann Whitborn, to receive the rents, &c., exclusively, during her life; and *after her decease to the use of the children of her body, or of such children or grandchildren as she should by deed or will [*556 appoint; and in default of appointment, to the use of the heirs of her body; and in default of such issue, to his own right heirs for ever. Then followed a similar devise to the same trustees and their heirs, of the premises called Beera; but in default of issue of the body of Ann, to the use of W. Tozer, his heirs and assigns, for ever. He then devised to his wife and her assigns for her life, and for one year after her decease, a house in Ford Street, Moretonhampstead, then in his possession (she permitting his daughter, Ann Whitborn, to live therein, and enjoy part thereof), and other premises in the will described; and after her decease, he devised the same to the said Henry Rundle the younger and W. Tozer, their heirs and assigns, upon the same trusts as before, and, for want of issue of the body of Ann, to the use of H. Rundle and the heirs of his body, and, in default of such heirs, to the testator's right heirs for ever.

The will concluded with these words:—"And I hereby will, order, and direct that the said trustees, and each of them, shall, may, and do, in every respect, give receipts, pay money, and *demise the aforesaid premises*, or any part thereof, as shall be consistent with their duty and trust, or otherwise."

Edward Whitefield, the testator, died in August 1781, without having altered or revoked his will, leaving the said Catherine his wife, Ann Whitborn his daughter, Thomas Whitborn, Henry Rundle, and William Tozer, him surviving, the said Ann Whitborn being his only child and heiress at law. Catherine, the widow, *continued in possession of the estate called Steward, &c., until the 26th of March, 1791, when she died, leaving the said Ann Whitborn, [*557 and Thomas Whitborn, her husband, her surviving. Upon her death the said Ann Whitborn was possessed or in receipt of the rents and profits of the said estate called Steward; and she also, immediately, upon the death of her father (the said Edward Whitefield) entered into and was possessed of all the other premises whereof the said Edward Whitefield had been so seised as aforesaid, until her death on the 30th of August, 1827.

By indenture, bearing date the 20th of January, 1792, Thomas Whitborn and his wife covenanted to levy a fine as to part of the premises, and to suffer a recovery as to other parts, which were to enure to the use of trustees, their heirs and assigns, upon trust for Ann Whitborn for life; and after her decease for such persons as she should by deed or will appoint. In the same year a fine was levied and a recovery suffered pursuant to the covenants in that deed.

In 1802 Thomas Whitborn died, living Ann Whitborn his wife, and said Ann

W. Keen their only child and his heiress at law, and Robert Keen her husband, him surviving. The case then stated an appointment made by Ann Whitborn, on the 6th of July, 1816, through which appointment the defendants claimed; that in August 1827 Ann Whitborn died, leaving Ann W. Keen her surviving, who had six children, William Keen, the lessor of the plaintiff, and five daughters. One of these was Susan Arabella Walbank, married to Matthew Walbank; and she and her husband were the defendants in this suit. In May 1828, the said Ann W. Keen died, leaving her husband Robert Keen, and her said six *558] children, her surviving, and leaving the said W. Keen her heir at law. The said six children, and the said Matthew William Walbank, are still living.

This case was argued during the last term(a) by

Coote for the plaintiff. The trustees under the will of Edward Whitefield took only a legal estate pur autre vie, that is, during the life of Ann Whitborn. The power given to her to appoint was a legal power, and the remainder over in default of appointment to the use of the heirs of her body was a legal remainder: she was, therefore, equitable tenant for life, with a legal power of appointment, and a legal remainder to the heirs of her body which would not unite with her preceding equitable life estate, so as to give her an estate tail. The power was destroyed by the fine, and the subsequent appointment took no effect; and if that be so, the lessor of the plaintiff, as the eldest son of Mrs. Keen, is now entitled, as tenant in tail, to all the lands devised by his grandfather's will. It is a general rule in the construction of wills, that where there is a devise to trustees for particular purposes, the law will vest the legal estate in them as long as the execution of the trust requires it, and no longer; and as soon as the trusts are satisfied, the legal estate vests in the persons who are beneficially entitled to it. *Jones v. Lord Say and Sele*, 8 Vin. Ab. *Devise*, C. 6, pl. 19; *Doe d. White v. Simpson*, 5 East, 162; *Doe d. Pratt v. Timins*, 1 B. & A. 530; *Doe d. Woodcock v. Barthrop*, 5 Taunt. 382; *Doe d. Player v. Nicholls*, 1 B. & C. 336; *Hawker v. Hawker*, 3 B. & A. 537. Here the execution of *the trusts required no *559] more than that the trustees should take the estate during the life of Ann Whitborn. That being so (and supposing that she did not execute her power of appointment), on her death the legal estate vested in the lessor of the plaintiff, as legal tenant in tail.

Assuming that the trustees took only an estate pur autre vie, the power of appointment reserved to Mrs. Whitborn is destroyed by the fine levied; for the power was a power in gross, and not simply collateral, and might, therefore, be destroyed by the fine. A power simply collateral, i. e. a power given to a person who has no estate in the land, and to whom no estate is given, to dispose of the estate in favour of another person, undoubtedly cannot be extinguished by a fine, because it is but an authority and no interest; *Digges's case*, 1 Rep. 173. But a power in gross, viz., one given to a person who had an interest in the estate at the execution of the deed (or other instrument creating the power), or to whom an estate is given by it, but which enables the donee to create such estates only as will not attach on the interest limited to him, may be destroyed by a fine. *Albany's case*, 1 Rep. 111, *Digges's case*, and *Edwards v. Slater*, Hardres, 410, show that if tenant for life, with a power, levies a fine, all his interest and power are extinguished, and he gains a new estate by wrong. It is true that modern decisions have established that, although a fine alone will have the effect of extinguishing a power appendant or in gross, yet, if it appear clearly from the deed leading the uses that the intent was to preserve the power, it will continue. *560] *Tomlinson v. Deighton*, 10 Mod. 71, *Herring v. Brown*, 2 Show. 185, *The Earl of Jersey v. Deane*, 5 B. & A. 569, *Tyrrel v. Marsh*, 3 Bing. 31. But here no such intent appears, for the deed declaring the uses gave a power to appoint in favour of any person; whereas the power created by the will was only in favour of children of the body of Ann Whitborn, or grandchildren and their

(a) Before Lord TENTERDEN, C. J., LITTLEDALE, PARKER, and PATTESON, J.

heirs. The intention, therefore, was not to save the power given by the will, but to create an entirely new one.

Preston, contrd. The trustees under the will of Edward Whitefield took the whole legal fee. First, the words "to them and their heirs" are sufficiently large to carry the whole inheritance, and must have that effect, unless a contrary intention can be shown from the other parts of the will. *Doe v. Willan*, 2 B. & A. 84. And the intention of the testator will be best answered by construing the will so as to give the trustees a fee. *Jones v. Lord Say and Sele*, 8 Vin. Ab. *Devise*, C. b, pl. 19, was determined on the peculiar expressions used in the will. It was a case *sui generis*. The subsequent cases have undoubtedly established that, under a devise to trustees, they are to take no larger estate than is useful or necessary in order to effectuate the intention of the testator. But here, the purposes of the will require that the trustees should take the fee, for they are to give receipts, pay money, and *demise the premises*, or any part thereof, as shall be consistent with their duty and *trust*, or otherwise. Now, as there is no restriction on the direction given to the trustees to demise the land, except that which a court of equity will *impose, they must, for that purpose, have the fee, otherwise all the leases must be deter- [*561 minable on the death of Mrs. Whitborn. Besides, the reasoning of Bayley, J., in *Doe v. Willan*, 2 B. & A. 89, applies here; because, as they are to demise for any term they think proper, the true construction of the will is, that they are to create a term out of their interest; and if so, they must have a reversion after that term ceases. Then, if the trustees took the fee, the lessor of the plaintiff has no title at law; and it will be unnecessary to decide whether the fine destroyed the power. But, supposing even that the trustees took an estate only *pur autre vie*, the power was not extinguished by the fine. There is no authority to show that such a power of appointment as this, given to a person having only an equitable estate for life, can be so extinguished. It was not an interest in the estate, but only an authority. *Smith v. Death*, 5 Madd. 371, may perhaps be relied upon on the other side; but that has not been followed up in subsequent cases. The power of appointment here was a power in the abstract; the person who is the object of such a power has the interest, and may release it; but not so the donee of the power. Upon first principles an interest is releasable, but a power in the abstract is not. In *Digges's case*, 1 Rep. 174, and *Albany's case*, 1 Rep. 111, the releasor had an interest. Here, too, by the deed to lead the uses, it appears manifestly to have been the intent of the parties to the fine not wholly to destroy the power, but to preserve it. (a)

**Coote, in reply.* The direction given by the will of Edward Whitefield to the trustees to demise the land, may be construed as creating a power; and then the leases to be granted by them might take effect out of the power, and not out of the estate. In *Doe v. Willan*, 2 B. & A. 84, it seems to have been conceded that such a clause might, except for the particular expressions in that devise, have been treated either as a trust or a power. In *Doe v. Simpson*, 5 East, 162, the trust was not only for raising an annuity, but for the payment of 800*l.*, and yet it was held not sufficient. It is now clearly settled, that a power in gross may be extinguished, *Sugden on Powers*, chap. i., sect. 5, 5th ed. Cur. adv. vult. [*562

Lord TENZARDEN, C. J., now delivered the judgment of the Court.

This case, which arises upon the will of Edward Whitefield, was argued before us last term. The first question made was, whether the devisees in trust under that will took the whole legal fee? We are of opinion that they did; and as that defeats the claim of the lessor of the plaintiff in a court of law, it is unnecessary to notice the other points or questions that were discussed at the bar.

(a) Two other points were raised in the case, viz. first, whether, at all events, Mrs. Keen's husband was not tenant by the curtesy; and, secondly, if the power was not destroyed, whether it was or was not duly executed; but the judgment does not proceed on these points, and it has not been deemed necessary to notice them in the text

By the will the testator gives to Rundle the younger and Tozer, and their heirs, the tenements in question, and the reversion and remainder thereof, and all his estate and interest therein, to hold to them, their heirs and assigns. These words are sufficient to carry the whole fee, unless it can be clearly collected from *563] other parts of the will that the testator intended that the estate given to them should cease at some certain time or event. The trusts are, to permit a married woman to enjoy the premises, and receive the rents for her own separate use during her life; and after her decease, upon trust and to the use of such of her children or grandchildren as she may appoint; and in default of appointment, to the use of the heirs of her body; and for default of such issue, to his own right heirs. This part of the will relates to some particular lands. It is followed by other parts precisely of the same tenor, but relating to other lands; and then concludes thus,—“And I hereby will, order, and direct that the trustees and each of them shall, may, and do in every respect give receipts, pay money, and demise the aforesaid premises, or any part thereof, as shall be consistent with their duty and trust or otherwise.” Now if leases made in pursuance of this direction would take effect out of the estate of the trustees, they must take the fee; and it was therefore contended for the plaintiff that this direction should be considered as a power, and leases might have effect as an execution of the power. The language of this clause is unlike that of any will by which a leasing power has been given, and it specifies no limit or qualification as to duration, rent, or other matter; but seems evidently intended to authorize any lease that would not be considered in a court of equity as a violation of the duty of a trustee. It is in this respect more large and general than the trust contained in the will of Packington Tomkyns, upon which the case of *Doe d. Tomkyns v. Willan*, 2 B. & A. 84, arose, and in which it was held that the trustees *564] took the whole fee. It is true that in that case the devise relating to leases was the first clause and trust in the will; but the position of a clause in a will is in itself an immaterial circumstance, because the construction is to be made upon the whole instrument taken together. We consider that case as a direct authority for the present; and it is sufficient to refer to it, and the opinions of the Judges as reported, without repeating them.

The defendant, therefore, is entitled to the postea.

Judgment for defendant.

DOE on the several demises of FREDERICK BOOTH and THOMAS
HOUSE v. JOHN FIELD. *June 1.*

Testator devised all his lands, &c., unto and to the use of trustees, their heirs and assigns for ever, upon trust to pay the rents and profits to the separate use of his eldest daughter for life, and after her decease, upon trust to convey the same to the use of such person, and for such estates, as she by her will should appoint, and in default of such appointment, to the use of her right heirs: Held, that the trustees took an estate in fee simple in the lands devised.

EJECTMENT for a messuage and land in the parish of Mitcham, Surrey. The demises were laid on the 20th of April, 1827. At the trial before Alexander, C. B., at the Spring assizes for the county of Surrey 1829, a verdict was found for the plaintiff, subject to the opinion of this Court on the following case:—

The late Harry House of Pall Mall being seised in fee of the premises in question, devised them unto and to the use of William Devaynes and John Leggatt, their heirs and assigns for ever, upon trust to pay, apply, and dispose of the rents, issues, and profits to and for the separate use and benefit of the testator's eldest daughter Dorothy Corner, during her life, separate and apart *565] from John Corner, her then husband, and from any future husband, and not subject to the debts or control of such husband, and with full power to the said Dorothy Corner, whether covert or sole, and notwithstanding her coverture, to give receipts for the rents, issues, and profits of the said premises,

which should be a discharge to the trustees; and from and after the decease of the said Dorothy Corner, upon trust to convey the same to the use of such person and persons, and for such estate and estates, intents and purposes, and in such manner as she, the said Dorothy Corner, by her last will and testament in writing, duly executed, should, whether covert or sole, and notwithstanding her coverture, limit, direct, or appoint; and in default of such limitation, direction, or appointment, to the use of the right heirs of the said Dorothy Corner for ever.

In 1802 the testator died seised of the premises, and thereupon Dorothy Corner, being then married to the said John Corner, entered into the receipt of the rents and profits. In 1803 John Corner, and Dorothy his wife, sold the estate to William Pontifex, but part of the purchase-money was to remain in mortgage on the estate; and in Trinity term 1804 a fine with proclamations was levied of the premises by the said John Corner, and Dorothy his wife, with other parties, to Robert Corner; and it was declared by the deed to lead the uses, that the fine should enure to the use of Devaynes and Leggatt (the trustees of the will), and their heirs, subject to redemption by Pontifex. The latter afterwards agreed to sell the estate to Wells Orton; and it having been objected on his part that D. Corner had no power to appoint by deed, but by will only, she, in 1816, being still married, made her will, whereby she gave, devised, limited, directed, and appointed unto and to the use of *the said Wells Orton the said premises (with others), to hold the same unto the said Wells Orton, his heirs and assigns for ever, and to be conveyed and assured as he or they should direct, limit, or appoint. In the same year Dorothy Corner died without having had any issue, and leaving the said John Corner her husband her surviving. [*566]

Leggatt, one of the devisees in trust named in the will of Thomas House, disclaimed by deed. Devaynes, the other trustee, died, having first devised all his estates to Booth and two other persons, and they joined in a deed with Orton, and conveyed to the defendant all their estate in the premises mentioned in the will of Harry House. Dorothy Corner was an illegitimate child of the said Harry House. Thomas House, one of the lessors of the plaintiff, was his heir at law. Booth, the other lessor of the plaintiff, was the surviving devisee in trust of the real estates of the said W. Devaynes. This case was argued in the last Easter term (a) by

Talfourd for the plaintiff. The plaintiff can recover only on the demise of House, as Booth, the other of the lessors of the plaintiff, was a party to the conveyance to the defendant. If Dorothy Corner died without having executed the power of appointment given to her by her father's will, the estate of the trustees was at an end (the purposes of the trust being determined), and then the heir at law of the testator was entitled. The questions then are, 1st, what was the effect of the fine? 2dly, if nothing passed by the fine, whether it so operated as to vitiate the subsequent execution of the power by the will? As to the first question, it is *clear that under the will Mrs. Corner took only an estate for life with a power of disposition by will, and that the appointment otherwise than by will was void. Doe dem. Thorley v. Thorley, 10 East, 438, is in point. That was an ejectment by the heir at law of John Thorley, who had devised to his wife all his freehold estate during her natural life, "and also at her disposal afterwards, to leave it to whomsoever she pleased." The defendant claimed under a feoffment made by Mary Thorley in her lifetime, and it was held, the disposal of it by the feoffment in her lifetime was void. Here the words are express, that D. Corner is to appoint by her last will and testament. The fine had no operation on the legal estate which was in the trustees; and the only question is, did it operate so as to extinguish the power? because, if it did, then she must be considered as never having executed it, and the premises vest in the heir at law of the testator. (He then contended that this was such a power as might be extinguished by a fine, to which point he cited Digges's

(a) Before Lord TENTERDEN, C. J., LITTLSDALE, PARKER, and PATTERSON, J.

case, 1 Rep. 175 a, *Penne v. Peacock*, Cases Temp. Talbot, 41, and *King v. Melling*, 1 Vent. 225.)

Coote, contrâ. By this will the trustees took an absolute estate in fee-simple, and Dorothy Corner took an equitable estate for her separate use for life with an equitable power to appoint by will, and an equitable remainder in fee to her own right heirs, which, by the rule in *Shelley's case*, united with her prior estate for life, and gave her the equitable inheritance, which passed by the fine levied by her and her husband to the parties under whom the defendant claims. And *568] a *conveyance having also been made to the defendant of the legal estate by Booth (who was the surviving devisee of W. Devaynes, the surviving trustee of Harry House), the title of the defendant is perfect both at law and in equity. The question as to the extinction of the power by the fine does not arise if Dorothy Corner had only an equitable power of appointment, because the legal estate which was in the trustees is now in the defendant; and to say that Dorothy Corner had an equitable interest for life, with a legal power of appointment, would be cutting down the estate of the trustees to an estate for life. The rule of law undoubtedly is, that an estate will not be raised by implication in trustees beyond what is necessary for the performance of their trusts, *Doe d. White v. Simpson*, 5 East, 162, *Doe d. Woodcock v. Barthrop*, 5 Taunt. 382, *Doe d. Player v. Nicholls*, 1 B. & C. 336, *Doe d. Compere v. Hicks*, 7 T. R. 433, and that an express estate in fee will be cut down if it be inconsistent with the testator's manifest intention; but this rule has been established in favour of right and in furtherance of the will of testators. Here the trustees, in order to effectuate the intention of the testator, must take an estate in fee, for they could not otherwise convey to such person and for such estate as Dorothy Corner might by her will appoint. Besides, the very words of the devise "unto and to the use of the trustees, their heirs and assigns for ever," amount to an express gift of the fee, *Doe d. Lloyd v. Passingham*, 6 B. & C. 305. Here the plaintiff seeks to strike out of the devise to the trustees the express words "*for ever*," and to introduce in their stead the words "for the *569] life of Dorothy Corner." *Penne v. Peacock*, For. 41, Temp. Talb. 41, *shows that the trustees have the legal estate, for it was there assumed that the fine operated on the trust estate alone. Secondly, supposing it admitted that the legal estate did not vest absolutely in the trustees, but determinably on the death of Dorothy Corner without executing the power, still the power was well executed; the interest of the appointees has been conveyed to the defendant, and the result is the same. (He then proceeded to contend that the power in this case was not extinguished by the fine, for that, if it was a legal power, it was simply collateral, in which respect this case was distinguishable from *Penne v. Peacock*.)

Talfourd in reply. The estate, in default of appointment, is to go to the right heirs of Dorothy Corner. If she left heirs the estate would be in them. The trustees, therefore, did not take an absolute fee at all events to them and their heirs, because that was not necessary to enable them to effectuate the testator's intention.

Cur. adv. vult.

Lord TENTERDEN, C. J., now delivered the judgment of the Court.

In this case, which was argued before us last term, one of the questions was, Whether the devisees in trust under the will of Harry House, on which the case arose, took the fee? it was clear that if they did, the lessor of the plaintiff could not recover; we are of opinion that they did, and it is therefore unnecessary to notice the other points. In this case it is perfectly clear upon reading the will, and without reference to any authorities or decisions, that the trustees must take *570] *the fee in order to give effect to all the directions of the will.

The testator gives all his freehold lands, tenements, and hereditaments in the parish of Mitcham, and all his estate, right, title, and interest therein, unto and to the use of William Devaynes and John Leggatt, their heirs and assigns for ever. The effect of those words alone would probably be to give a fee, on the ground that a use cannot be limited on a use, but the declaration of

the trusts leaves no room for doubt, for these are, upon trust to apply the rents and profits to the separate use of his eldest daughter, a married woman, for her life, and, after her decease, upon trust *to convey* the same to the use of such persons, and for such estates, as she may appoint; and in default of appointment, to the use of her right heirs. By the very words, therefore, of this will the devisees in trust are, after the death of the testator's daughter, *to convey* the fee, and this they cannot do unless they take the fee under the will.

The defendant, therefore, is entitled to the postea.

Judgment for the defendant.

***VISGER and Another, v. DELEGAL.**

[*571]

An affidavit to hold to bail, stating that the defendant is indebted to the plaintiff 1000*l.* "*on balance of account for money paid, laid out, and expended by the plaintiff to and for defendant, and at his request, and for money had and received by the defendant for the plaintiff, and for interest of moneys due by the defendant to the plaintiff,*" is not sufficiently certain.

F. POLLOCK had obtained a rule to show cause why the sum of 1010*l.*, deposited with the sheriff by the defendant in lieu of bail, should not be paid out to him on filing common bail. The defendant was arrested on an affidavit stating him to be indebted to the plaintiffs in 1000*l.* and upwards, *on balance of account for money paid, laid out, and expended by the plaintiffs to and for the defendant*, and at his request, and for money had and received by the defendant for the plaintiffs, and for interest on moneys due by the defendant to the plaintiffs.

Campbell and Ashmore showed cause. The objection is, that the words "money paid, laid out, and expended by the plaintiffs to the defendant," taken by themselves, may be construed to mean money paid on account of a debt by the plaintiffs to the defendant, and, consequently, that the affidavit is not sufficiently certain. But whatever construction may be put on this clause of the affidavit, still, calling in aid the words "on balance of account," it will appear that on reference to the other items, namely, for money had and received, and interest, the plaintiffs have, upon the whole, a demand against the defendant; and that is distinctly sworn to be upwards of 1000*l.*

F. Pollock, contra. It is quite clear that an omission has been made in the affidavit through negligence, and the Court ought not to be astute in finding out meanings *to supply such a defect. A party swearing an affidavit to hold to bail never professes to set out the particulars of a mutual account. To presume such an intention here would be contrary to the strictness with which affidavits of this kind have always been construed. [*572]

LORD TENTERDEN, C. J. There are certain forms of affidavits to hold to bail in common use, and generally known and understood. The safest course is, that individuals should conform to these, and not depart from them, and then call upon the Court for such a construction as may remedy the fault.

LITTLEDALE, J., concurred.

PARKE, J. It is clear that, without the words "on balance of account," the affidavit would be bad. But these words do not necessarily imply more than that the defendant was originally indebted to the plaintiffs on the accounts stated in the affidavit, in a larger amount, which has been reduced to 1000*l.* by a set-off. That leaves the case in the same uncertainty as if no balance had been mentioned.

TAUNTON, J., concurred.

Rule absolute.

*573] *DOE on the demise (amongst others) of WILLIAM BLACKNELL
v. PLOWMAN. June 1.

In 1772 a term of 1000 years was created by deed, for the purpose of securing a sum of 5000*l.*; and in 1787, the principal and interest having been paid, the residue of the term was assigned in trust, for the devisees of the person who created the term. In 1789 the premises were conveyed to a purchaser by deed and the residue of the term was assigned in trust for the purchaser, her heirs and assigns, or as she should appoint, and in the mean time to attend the inheritance. The purchaser entered into possession of the premises, and continued so possessed till her death. In 1808 she executed a marriage settlement, reserving to herself a power of appointment by deed or will; and after the marriage, she in December 1813 devised all her real estate. Neither in the marriage settlement nor in the will was any mention made of the term of 1000 years. She and her husband having both died, it was held, on ejectment brought by her heir at law, that there were no premises from which a surrender of the term could be presumed.

EJECTMENTS to recover possession of lands and tenements in the county of Suffolk. At the trial before Bayley, J., at the Summer assizes for Suffolk 1826, a verdict was found for the plaintiff, subject to the opinion of this Court on the following case:—

The lessor of the plaintiff, William Blacknell, was, at the period of the demises in the declaration the heir at law of the late Lady Graves, formerly Susannah Blacknell, and, as such heir at law, claimed the premises in question.

By indenture bearing date the 23d of December, 1772, Thomas Anguish, being seised in fee of the premises, demised the same to Armine Styleman for a term of 1000 years for securing the sum of 5000*l.* and interest. And by an endorsement on the said mortgage deed, dated the 1st of December, 1781, the said Armine Styleman declared that the said 5000*l.* principal money was the property of Nicholas Styleman his son. Thomas Anguish by his will, dated the 3d of September, 1784, devised all his real estates unto Sir William Henry Ashurst and John Hare, and died in or about the year 1785. By another endorsement made on the indenture of 1772, dated the 1st of January, 1787, *574] reciting that the said principal sum of 5000*l.* and all interest *thereon had been duly paid to Nicholas Styleman; the said Armine Styleman, by the direction of the said Nicholas, and at the nomination of Sir William Henry Ashurst and John Hare devisees as aforesaid, assigned the residue of the said term of 1000 years then to come and unexpired, to Robert Reeve, his executors, administrators, and assigns, in trust for the said Sir William Henry Ashurst and John Hare, their heirs and assigns, and to be disposed of as they should direct or appoint.

By indentures of lease and release, the release dated the 2d of September, 1789, and made between the said Sir William Henry Ashurst, Knight, and John Hare, of the first part; Sarah Anguish, widow, and executrix of Thomas Anguish, of the second part; Susannah Blacknell, of the third part; Robert Reeve, of the fourth part; and Dudley Baxter, of the fifth part; Sir William Henry Ashurst and John Hare conveyed the premises in question to the said Susannah Blacknell, and to her heirs and assigns, in consideration of 1850*l.* purchase-money. And by the same indenture, the residue of the said term was assigned by the said Robert Reeve to Dudley Baxter, his executors, administrators, and assigns, in trust for Susannah Blacknell, her heirs and assigns, and to be disposed of as she or they should direct or appoint. And in the mean time to attend the freehold, reversion, and inheritance of the premises

Susannah Blacknell entered into possession of the premises at the date of the last-mentioned deed, and continued possessed until the time of her death hereinafter mentioned.

In the year 1808 Susannah Blacknell intermarried with Sir Thomas Graves, and by indentures of lease and release made before and in contemplation of the said *575] marriage (the release dated the 20th of July, 1808) *between Susannah Blacknell of the first part, Sir Thomas Graves of the second part, and the said Dudley Baxter and one Robert Baxter of the third part, Susannah Blacknell conveyed all her estate and interest in the premises in question to Robert

Baxter, his heirs and assigns, in trust as thereafter mentioned, and (amongst other trusts) to the use of the said Susannah Blacknell, her heirs and assigns, until the said intended marriage; and from and after the marriage, &c., to such uses and subject to such powers, &c., as the said Susannah Blacknell, notwithstanding her said intended coverture, should by deed or will appoint; and for want of appointment, to the use of Robert Baxter, his heirs, during the lives of S. Blacknell and Sir T. Graves, upon the trusts thereafter mentioned; and after the decease of Sir T. Graves, in case S. Blacknell should survive, to the use of S. Blacknell, her heirs and assigns for ever; but in case she should depart this life first, to such uses, &c., as she should appoint; and in default of appointment, to her own right heirs. No mention was made in the deed of the term of 1000 years. The marriage took place, and on the 28th of December, 1813, Lady Graves, by will, appointed all her real estate unto and to the use of R. B. and W. E., their heirs and assigns, upon the trusts therein mentioned. No mention was made in this will of the term of 1000 years. Sir Thomas Graves died in March 1814; Lady Graves survived her husband, and died on the 31st of January, 1816, without revoking or altering her said will. Several questions were reserved, and, among others, whether it was competent for the defendants to set up the said term of 1000 years against the plaintiff; and if the Court should be of opinion that it was, then the Court was to say, upon the whole facts, in what manner the jury ought to have been directed as to the said term by the learned *Judge, and what verdict the jury ought to have found thereupon, and a nonsuit or a verdict for the plaintiff, was to be entered accordingly. [*576]

Coote for the plaintiff. The facts of the term having been created so long since, and of the purposes for which it was originally created having been answered, and of its not being mentioned either in the marriage settlement or the will, afford ample ground for presuming that it was surrendered; the learned Judge should have directed the jury so to presume; and they ought to have found accordingly.

In *Doe d. Burdett v. Wrighte*, 2 B. & A. 710, a term of 1000 years was created by deed in 1717, and in 1735 was assigned for the purpose of securing an annuity to A., and after that *to attend the inheritance*. A. died in 1741, and the estate remained undisturbed in the hands of the owner of the inheritance and her devisee from 1735 to 1813, without any notice having been in the mean time taken of the term, except that in 1801 the devisee, in whose possession the deeds creating and assigning it were found, covenanted to produce those deeds when called for. The Judge directed the jury to presume a surrender, and on motion for a new trial, it was held that, under these circumstances, the direction was proper, and the jury were warranted, on ejectment brought for the premises by the heir at law, to presume a surrender of the term. In *Doe d. Putland v. Hilder*, 2 B. & A. 782, a term of years was created in 1762, and assigned over to a trustee in 1779 *to attend the inheritance*. In 1814 the owner of the inheritance executed a marriage settlement, and in 1816 he conveyed his life interest in the estate to a *purchaser, as security for a debt; but no assignment of the term, or delivery of the deeds relating to it, took place on either occasion. In 1819, [*577] an actual assignment of the term was made by the administrator of the original trustee to a new trustee, for the purchaser in 1816. On ejectment brought against the purchaser by a prior encumbrancer, the Judge directed the jury to presume a surrender, and the jury having found accordingly, a rule nisi was granted for a new trial; and after argument it was holden, that the direction was right, and that the jury were warranted in presuming that the term had been surrendered before 1819. These cases are directly in point. [Lord TENTERDEN, C. J. The doctrine laid down in those cases, I believe, has been much questioned.(a)]

(a) The doctrine propounded in the above cases was called in question in *Doe v. Putland*, Sugden on Vendors and Purchasers, 440, by Richards, C. B., and Graham, B.; and in *Deardon v. Lord Byron*, *ibid.* 444, by Richards, C. B.; by Lord Chancellor Eldon in 1820, in *The Marquis of Townsend v. The Bishop of Norwich*, *ibid.* 443; and in *Hayes v. Bailey*, 1820, *ibid.* 444. And in *Cholmondeley v. Clinton*, *ibid.* 444, Lord Eldon again expressed a strong opinion against the doctrine of presuming the surrender of a term to attend the inheritance; and in *Aspinwall v.*

Is such a term as this usually noticed in a marriage settlement?] It certainly is not the general practice to notice such terms.

Lord TENTERDEN, C. J. If that be so, there is no ground whatever for presuming that this term, which *was assigned to attend the inheritance, *578] was ever surrendered.

PARKE, J. It being admitted that, in point of practice, it is not usual to notice such a term as this in a marriage settlement, there is not a single fact in the case from which a surrender of the term could be presumed. That being so, the legal estate is not in the lessor of the plaintiff, and the judgment must be for the defendant.

LITTLEDALE and TAUNTON, Js., concurred. Judgment for the defendant.

Kempson, *ibid.* 446, the same learned person speaking of the case of *Doe v. Hilder*, 2 B. & A. 782, said, "I have no hesitation in declaring that I would not have directed a jury to presume a surrender of the term in that case; and for the safety of the titles to the landed estates in this country, I think it right to declare that I do not concur in the doctrine laid down in that case." See Sugden on Vendors and Purchasers, 8th edit. p. 440 to 446; and Matthews on the Doctrine of Presumption and Presumptive Evidence, 226 to 259.

The KING v. MILLS and Another, Justices of the County of ESSEX.
June 1.

The statute 56 G. 3, c. 139, s. 2, which directs that a parish indenture shall be allowed by two justices of the county into which the apprentice is to be bound, gives those justices a discretion to determine on the propriety of the binding generally, and not merely with regard to the fitness, respectively, of the master and apprentice.

A RULE nisi had been obtained for a mandamus to the defendants, two justices of the county of Essex, commanding them to consider and determine whether there was any objection to the allowance, and as to the fitness of allowing a certain indenture for the binding of William Scarff, a poor boy, belonging to the parish of Wolverston in the hundred of Sanford in the county of Suffolk, and maintained in the general house of industry there, to Matthew Brook, of Wivenhoe in the county of Essex, ship-owner and fisherman. The affidavits in support of the rule stated, that Brook, a ship-owner and fisherman of Wivenhoe, being in want of an apprentice, applied to the directors and guardians of the poor of the hundred of Sanford in the county of Suffolk (incorporated by an act of *579] 30 G. 3, and empowered *thereby to bind out poor children residing in the house of industry or belonging to the parish), and that they having satisfied themselves that Brook was a man of property and of good reputation, and eligible in all other respects, sent W. Scarff (aged sixteen years), belonging to Wolverston, and maintained in the house of industry there, upon trial, and after he had stayed two months, it was agreed that the binding should take place; that on the 18th of December, Scarff was taken before the acting justices of the peace of the hundred of Sanford at the petty sessions, pursuant to the 56 G. 3, c. 139, s. 1, and the justices inquired into the propriety of binding him apprentice to Brook, and having made all inquiries directed by that statute, declared that they thought it proper he should be bound, and made an order to that effect, and afterwards signed and sealed an allowance of the indenture. On the 29th of January, 1831, Brook applied to the justices of the county of Essex, assembled in petty sessions (there being eight present, and the defendants being two of them), for the district in which Wivenhoe was situate, for their allowance of the indentures, but the application was opposed by the overseers of the parish of Wivenhoe, on the ground that there were pauper boys belonging to Wivenhoe whom Brook ought in preference to take; and the justices, without inquiring into the circumstances or character of Brook (no objection being made to him on those grounds), refused to allow the binding. The affidavits in answer to the rule stated, that the defendants and other said justices assembled in petty ses-

sions, after considering and weighing the application, and hearing the opposition thereto, unanimously determined not to allow the indentures, for they considered that Brook could be *provided with a boy, as an apprentice, better adapted for the service, by reason of his having been born and brought up in Wivenhoe (which is situate on the navigable river Colne, and a short distance from the sea), and having knowledge of a seafaring life, of which the boys from Wolverston were entirely ignorant; and it was added that the justices were principally influenced in their decision by the consideration that Wivenhoe ought not to be liable to have paupers from a distance settled on that parish; and by a wish to do justice and to afford that protection to the parish which they considered themselves bound to give. [*580]

Kelly showed cause. By the 56 G. 3, c. 139, s. 1, the justices of the county in which the residence of the intended apprentice is, are to make inquiries into the circumstances and character of the master, and to determine generally on the propriety of binding the apprentice to the person proposed. They, therefore, have, by express words, a discretion vested in them on the subject; and sect. 2, which requires the indentures to be allowed by the magistrates of the county in which the master resides, by implication, gives to those magistrates the like discretion: and if that be so, they have exercised it.

The *Attorney-General* and *Biggs Andrews*, *contra*. The justices have not exercised their jurisdiction upon the only point upon which they were entitled to exercise it, viz., the fitness respectively of the master and apprentice; for it is perfectly clear that they refused to allow the binding, on the ground that there were other poor boys in the parish of Wivenhoe whom the master ought to take.

*Lord TENTERDEN, C. J. The justices of the county into which the apprentice is to be bound have a general discretion to consider the propriety of the binding. If they had only a particular discretion, and had not exercised it, the court would have compelled them to do so; but here they have a general discretion, after inquiring into all the circumstances of the case, to determine on the fitness of the binding; and as they have exercised it, there is no ground for a mandamus. The rule, therefore, must be discharged, and with costs. [*581]

Rule discharged, with costs.

DRAX v. SCROOPE. June 2.

An agreement entered into by a client with his attorney, to pay him at a certain specified rate for business to be done, is not binding; but the charges made according to such agreement may be allowed on taxation, if the master, on inquiring into them, considers them proper.

Where such charges had been allowed on taxation and paid, the Court (on application about four months after) refused to order a review of the taxation, it not being shown that the Master had forborne to exercise his judgment on the charges, in consequence of the agreement between attorney and client.

A RULE was obtained in Easter term, calling on an attorney of this court to show cause why it should not be referred to the Master to review his taxation of the attorney's bill of costs in the above cause. The bill contained charges for journeys by the attorney and his agent, at the rate of five guineas a day, exclusive of travelling expenses. These were objected to before the Master, as exceeding the usual rate; but it was answered, that the client, soon after he began to employ the attorney, and before the business in question was done, had expressly agreed to a certain scale of charges, comprising those in question. The Master required affidavits in confirmation of this statement; they were made, and others put in in answer; and on consideration of the statements on both sides, and of the objections to the bill, the Master allowed the charges. The taxation *was finished in November 1830, and on the 13th of that month the amount was paid to the attorney, and he paid over a part of it. [*582]

to his agent, who, before the present application was made, went abroad to reside.

Follett now showed cause. It is not necessary to contend that an agreement like this is binding in ordinary cases, but only that it may be so under special circumstances like the present. In 1 Tidd's Practice, 333, 9th ed., it is laid down that an attorney's bill may be taxed, though there was a special agreement between him and the client that he should be paid for his time at a certain rate by the day, besides his expenses; but, of the authorities to which he refers on the subject, one (Sayer on Costs, 321) does not go far enough for the present motion; and another, an Anonymous case from 2 Barnard, K. B. 164, is to the contrary effect. The Court, in every case, will look at the particular circumstances, and will not hold the Master precluded from allowing costs on special agreement, if the circumstances appear to warrant them. Besides, in this case the taxation took place several months ago; the money was paid, and part of it again paid over by the attorney to his agent, who has gone abroad; and in 1 Tidd's Pr. 332 it is laid down, that after an attorney's bill "has been settled and paid, and the payment has been long acquiesced under, the Courts will not refer it to be taxed as a matter of course, nor, as it seems, unless a gross error or imposition be pointed out."

Barstow, contrd. On the merits of the case, as disclosed by the affidavits, this agreement is not such a one as the Master ought to have given effect to, in *583] favour of *the attorney. But, putting the objection on more general grounds, if an attorney could be allowed to set up a special agreement in the manner here contended for, it would be easy, in almost every case, to preclude a taxation, and the statute on that subject would be altogether defeated. Sayer on Costs, 321, and Newman v. Payne, 4 Bro. C. C. 350, cited in 1 Tidd's Pr. 333, fully bear out the present motion. The Anonymous case, 2 Barnard, K. B. 164, is not conclusive the other way, and the agreement there might possibly have been entered into before the act 2 G. 2, c. 23, providing for the taxation of attorneys' bills, was passed. In Walmsley v. Booth, 2 Atk. 27, where a client had given a bond to an attorney for the purpose of securing to him a certain remuneration for his services, Lord Hardwicke directed the Master to inquire what those services had been, and what the attorney ought to be allowed for them, and whether he was entitled to any extraordinary recompense. In Balme v. Paver, Jacob's Rep. 305, Lord Eldon declared a strong opinion against the right of a solicitor to agree for untaxed costs; and observed, "There is nothing that ought to be guarded against with so much jealousy as the right of the suitors to have their bills of costs taxed." And in Scougall v. Campbell, 3 Russ. 545, the Lord Chancellor again expressed himself to a like effect, and said, "I will not permit it to be intimated that a solicitor will act if his bills are not to be taxed, but will not act if his bills are to be taxed."

Lord TENTERDEN, C. J. No agreement of this kind, even with reference to *584] journeys, can be absolutely *binding; the Master must still exercise his judgment as to the propriety of allowing the charges, according to the circumstances laid before him. And if it had appeared in this case that the Master had thought no discretionary power was left him, and that he was precluded by the agreement from entering into the consideration upon which the charges were made, there would have been ground for the present motion. But this is not shown. And besides, the client comes for relief several months after the money has been paid upon the Master's allocatur, and when the attorney has paid over part of it to his agent, who has left the country. Under these circumstances, without establishing any precedent for other cases, I think the rule ought not to be made absolute.

LITTLEDALE, J. As a general rule, I think effect ought not to be given to these agreements between attorney and client. But there may be cases in which, from the particular nature of the business to be done, such contracts may be allowable, subject, however, to be looked into by the Master. Here the Master has exercised that authority.

PARKE, J. Agreements of this kind should be looked at with great jealousy, but as it does not appear in this case that the Master has not exercised his discretion upon the charges, I think the rule must be discharged.

TAUNTON, J., concurred.

Rule discharged, without costs.

***DOE dem. the Earl of CARLISLE and Others v. TOWNS. June 3. [*585**

Estates of inheritance in a manor were held at the will of the lord, according to the custom of the manor, subject to fines on the death of the lord or tenant, and on alienation, and to other dues. The tenant might aliene by customary bargain and sale, with the license of the lord endorsed. Courts were held twice a year, at which new tenants on death or alienation were bound to appear and have their names entered on a roll, paying a shilling to the steward. On default made, the lord might seize quousque :

Held, that such enrolment was not an admittance within the stamp act 55 G. 3, c. 184, which lays a duty on "customary estates passing by surrender and admittance, or by admittance only, and not by deed;" but that in case of alienation, the estates passed by the conveyance, licensed by the lord; and, where the lands descended, the heir became entitled as in case of freehold; and, consequently, that a person taking as heir was not bound, on enrolment, to receive a stamped admittance from the steward.

EJECTMENT for lands in the parish of Irthington, Cumberland. At the trial before Hullock, B., at the Spring assizes for Lancashire (in which county this Court had directed the cause to be tried) 1829, a verdict was taken for the plaintiff, subject to the opinion of the Court upon the following case:—

The Earl of Carlisle is lord of the several manors with and parcel of the barony of Gilsland in the county of Cumberland, whereof the manor of Irthington is one. In all these manors the freehold of the customary tenements is in the lord, and the mines and timber belong to him. There are about 500 tenants within the barony. In respect of each tenement, the lord is entitled to an ancient customary rent, to an arbitrary fine of two years improved value, or alienation by, or death of, the tenant, and to a fine certain of twenty times the ancient rent on the death of the lord. The estates pass by customary conveyance of bargain and sale, with the license of the lord endorsed thereon by his steward.

(A copy of one of these conveyances, with the license endorsed, was annexed to the case. By this instrument the alienor did grant, bargain, sell, alien, and surrender the premises therein described, the customary property of the alienor, held of the lord as parcel of the manor of *Brampton, parcel of the barony of Gilsland, at the will of the lord, according to the custom of the said manor, at the ancient yearly customary rent of 6*d.*, and performance of other rents, fines, duties, &c. Habendum to the only proper use and behoof of the alienee, her heirs and assigns for ever, at the will of the lord, according to the custom of the manor; yielding and paying the said ancient customary rent, &c. Covenants for title to grant and convey, for quiet enjoyment, and for further assurance. The endorsement was, "On behalf of the Right Hon. the Earl of Carlisle, I hereby license and allow this deed, provided the same be in nowise prejudicial to the said Earl, his heirs or assigns, in respect of any fines, dues, duties, or services," &c., "having received the sum of 8*l.* 3*s.* as the fine on this alienation, according to the general custom of Gilsland." Signed by the steward.)

Enfranchisements within the barony are effected by deed, whereby the lord bargains, sells, enfranchises, releases, and confirms the premises, to have and to hold freed and discharged from all customary tenures, and all general and dropping fines, and all payments by way of fine for admittance, and from all heriots, suits, and services, except suit of courts and suit of mills.

A court is held twice a year, at which the tenants of the barony are called by the roll, and proclamations are made, in case of death or alienation, for the heirs or new tenants upon alienation to appear, and on the appearance, the names of

such tenants are entered on a roll kept for that purpose by the steward, who receives on that occasion a fee of 1s. in respect of each tenant; and, on alienation, a further fee of 5s. is paid upon *the license being endorsed by the
*587] steward on the customary conveyance.

John Towns died seised of two customary tenements (for which this ejectment was brought) in the manor of Irthington, and was succeeded by the defendant, William Towns, his brother and customary heir. At a court duly held on the 28th of October, 1828, proclamation was made, calling upon W. Towns, customary heir of J. T., to come in and be admitted to two customary tenements, whereof J. T. died seised, according to the custom within the manor of I., of the yearly customary rents of 2s. 4d., &c., otherwise the same would be seized into the hands of the lord for default until an heir should come in. The defendant appeared, acknowledged that he was the customary heir, and claimed to be entitled to the tenements. The steward tendered to him a written admittance on a stamp, and required him to be admitted thereby. The defendant refused to take that or any written admittance on a stamp, but was willing to have his name enrolled, and tendered the steward a shilling, the customary fee upon enrolment. For the defendant's refusal to take a stamped admittance, the lord seized the tenements quousque. Such admittances were prepared by the steward in 1826, but it did not appear that they had ever been used before that time, either on death or alienation. The jury found that by the ancient custom of the manor new tenants on death or alienation were not bound to do anything more than appear and have their names enrolled, paying 1s., in order to become customary tenants. The case was now argued by

*588] *The *Attorney-General* for the lessors of the plaintiff. A written admittance on a stamp was necessary to complete the defendant's title. By statute 48 G. 3, c. 149, sched. part 1, a stamp duty is imposed upon instruments relating to "copyhold estates and customary estates passing by surrender and admittance, or by admittance only, and not by deed:" a duty is also laid on such instruments in the same terms, in 55 G. 3, c. 184, sched. part 1; and by sect. 83 of 48 G. 3, c. 149 (which is kept in force by the subsequent act), the steward is obliged in all cases of surrenders, admittances, and voluntary grants of or to any copyhold or customary lands, taken or made in court, to make out a copy of court roll of such surrender, admittance, &c., duly stamped according to the act and deliver the same to the party entitled, who (by sect 34) may be required to pay the stamp duty before the surrender shall be accepted or admittance granted. The question, therefore, in this case is, whether the estates for which the action is brought pass by deed or by admittance. They pass by admittance. The finding of the jury sufficiently shows this. The bargain and sale annexed to the case shows that the lands are held at the will of the lord, according to the custom of the manor. The freehold is in him: he has the trees and the mines. His license is necessary for lands to be conveyed by bargain and sale; and parties, to become customary tenants, are obliged to have their names enrolled, paying a fee to the steward. That is in fact the admittance. By the mere execution of a deed, without admittance, nothing would pass. The property will sometimes pass from one owner to another without deed, and then, if there were no stamp
*589] on admittance, the duty would be altogether lost. Wherever *it is necessary to the passing of the estate that there should be an admittance, to be notified by something in writing, there, by the acts, a stamp is necessary. [Lord TENTERDEN, C. J. The tenant here does not go to be admitted in order to perfect his estate. He has a title by descent against every one but the lord.] An enrolment is necessary, and that is a registration of the fact of admittance. [Lord TENTERDEN, C. J. Then in case of alienations in these manors, where there is a deed, two stamps will be necessary, for the deed and for the admittance.] It may be so. That is an accidental inequality which the legislature did not foresee. The question is, whether the Court can say that that which takes place before the steward at the time of enrolment, is not an admittance.

[Lord TENTERDEN, C. J. The duty is imposed by the stamp act in the case of "customary estates passing by surrender and admittance, or by admittance only, and not by deed." The estate here passes wholly by admittance. The proceeding before the steward is, in effect, a new grant. [LITTLEDALE, J. There can be no new grant in this manor. The lord never grants at all; the property always remains in him, as a kind of perpetual trustee.] If not a grant, it is a consent.

Cresswell, for the defendant, was stopped by the Court.

Lord TENTERDEN, C. J. I am of opinion that these tenements do not fall within the description in the schedule, of customary estates passing by admittance only, and not by deed. It is found in the case that the tenements on this manor do pass by customary conveyance *of bargain and sale. It appears to me that the legislature intended to lay a fine on the transfer of copyhold [*590 and customary property, when affected by deed of whatever description, or by matter of record; in the one case the stamp is imposed on the deed; in the other, where a surrender or admittance takes place and is recorded in Court, the stamp is laid upon the copy of the court-roll, to be delivered to the party entitled.(a) But in the present case, the property did not pass by deed, the defendant taking as heir to his brother; nor did it pass by matter of record. There was simply an act in court; nothing was recorded. Here, therefore, is no writing upon which a stamp can be imposed conformably to the act of parliament; and consequently I see no ground for saying that a stamp was necessary here, more than in the case of freehold property passing by descent.

LITTLEDALE, J. The schedule lays the duty on estates which pass by surrender and admittance, or admittance only, and not by deed; excluding the latter case for a very good reason, viz., that where there are deeds the revenue is already provided for. The tenure in these manors is peculiar. It is not to hold merely according to the custom of the manor, as is generally the case with such estates in the north of England, but at the will of the lord, according to the custom of the manor: it is a customary estate of inheritance at will; it is alienated by customary bargain and sale, with the license of the lord endorsed; and it passes by the deed only, without admittance. At the courts, which are *held twice a year, proclamation is made for heirs or alienees to appear, [*591 and their names are then enrolled; but this is not an admittance, it is only a notification of the change of tenants. In case of alienation, the title is complete on execution of the bargain and sale, and license from the lord; and where the lands pass by descent, they vest in the same manner as freehold property.

PARKE, J. I think the defendant is entitled to judgment on the construction of the stamp act, inasmuch as these estates do not come within either the general description in the schedule, of customary estates passing by admittance only and not by deed, or any of the particular descriptions which follow. Whether the proceeding before the steward operates in any way as an admittance or not, it is unnecessary to decide.

TAUNTON, J. It appears to me that these estates pass by deed, and that the proceeding in court is only so far an admittance as it denotes that the lord has accepted the party for a tenant. It is a strong argument against the view of the statute contended for by the lessors of the plaintiff, that, according to their construction, the duty on admittance would attach where the alienation takes place by deed, and so two stamps would be required on the same transfer. I think no duty is payable on the kind of enrolment stated in this case.

Postea to the defendant.

(a) 48 G. 3, c. 149, s. 33.

*592]

*CASHER v. HOLMES, Clerk to the Commissioners of ARUNDEL Port. June 8.

An act for keeping in repair a harbour, imposed certain duties enumerated in a schedule annexed, on goods exported and imported. In the schedule, under the head "metals," certain specified duties were imposed on copper, brass, pewter, and tin; and on all *other metals* not enumerated, for every 10*l.* value 10*d.*: Held, that the latter words did not include gold and silver; and, therefore, that the commissioners were not entitled to demand for specie or bullion, 10*d.* for every 10*l.* value.

THIS action was brought by the plaintiff to recover from the commissioners of Arundel Port, who were sued in the name of their clerk pursuant to the act of parliament hereinafter mentioned, the sum of 750*l.* as money had and received by them to the plaintiff's use. At the trial before Bayley, J., at the Spring assizes for the county of Sussex 1830, the learned Judge directed a nonsuit to be entered, giving the plaintiff liberty to move to enter a verdict for the above-mentioned sum. On motion, in Easter term, to enter such verdict, this Court directed a case to be stated, the facts of which were as follows:—

In September 1829, his majesty's frigate *Druid* arrived off Portsmouth, having on board a quantity of gold and silver in doubloons and dollars, bar gold, bar silver, and plate, which she had conveyed from parts beyond the seas to this country on account of several merchants resident in London, and which amounted in value to 273,091*l.* 8*s.* 5*d.*

The plaintiff was employed by the captain of the *Druid* to convey the above-mentioned gold and silver from Portsmouth to London, and deliver it at the bullion-office in the Bank of England, which is used by merchants as a place of deposit for the precious metals. The plaintiff, having received the gold and silver on board of a sloop belonging to him, called the *Elizabeth*, conveyed it
*593] first to Portsmouth, and thence into Little *Hampton Harbour, in the port of Arundel. On his arrival there he transhipped it from the sloop *Elizabeth* into barges, for the purpose of having it conveyed to London by inland navigation. The commissioners of Arundel Port demanded from him the sum of 787*l.* 10*s.* as the dues payable to them on the cargo, by virtue of an act of the 6 G. 4, c. clxx.(a) The plaintiff resisted the demand; whereupon the cargo
*594] was seized and detained *by the commissioners, and he, in order to relieve it from detention, was obliged to pay the sum demanded, which he did

(a) It enacts, that from and after the 1st of July, 1825, there shall be paid to the commissioners the several duties contained and set forth in the schedule annexed, for all such goods, wares, articles, matters, or things therein enumerated, which shall be exported or imported, laid on board, landed, or discharged out of any ship or vessel in the said port of Arundel; and for all goods not therein enumerated, there shall be paid one twelfth part of what the usual freight is, or shall hereafter be, from London to the port of Arundel. In the schedule the following duties are imposed:—

		s.	d.
COPPER, New	- - - - -	per Cwt.	0 2
Old	- - - - -	per Cwt.	0 1
IRON, In Bars or unwrought, &c.	- - - - -	per Ton	1 0
IRONWARE of all Descriptions	- - - - -	per Cwt.	0 1½
LEAD	- - - - -	per Cwt.	0 1
MEDALS	- - - - -	Ten Pounds Value	0 10
METAL, Cast	- - - - -	per Ton	1 0
Copper or Brass, unwrought	- - - - -	per Cwt.	0 1½
Copper or Brass, wrought	- - - - -	per Cwt.	0 0½
Pewter, wrought	- - - - -	per Cwt.	0 0½
Old Pewter	- - - - -	per Cwt.	0 0½
Tin	- - - - -	per Cwt.	0 1
And on all other Metals not enumerated, for every	- - - - -	Ten Pounds Value	0 10
PLATED GOODS	- - - - -	Ten Pounds Value	0 10
STEEL and STEEL WARE	- - - - -	Ten Pounds Value	0 10
STONES, Paving	- - - - -	100 Feet	2 0
Portland, Purbeck, or other Stone used for building	- - - - -	per Ton	1 0
Bolder or Flint Stones	- - - - -	per Ton	0 1
Chalk Stones, rough and hewn	- - - - -	per Ton	0 2
Great Millstone	- - - - -	-	0 6
Small Millstone	- - - - -	-	0 3
Stone or Stone Work, not otherwise enumerated	- - - - -	Ten Pounds Value	0 10

under protest, and afterwards brought the present action against the commissioners to recover it back. The questions for the opinion of the Court were, whether the commissioners were entitled to the sum of 787*l.* 10*s.* as dues payable upon the said cargo by virtue of the act; or whether the sum of 37*l.* 10*s.*, being one twelfth part of what the usual freight then was from London to the port of Arundel, was all that they were entitled to in respect of the same.

Sir *James Scarlett* for the plaintiff. The legislature did not mean to include in the schedule the articles of which this cargo consisted. They do not come under the head of "cast metal," for that applies only to metal thrown in a mould; nor of "all other metals not enumerated." It is a thing unknown to impose a duty on the precious metals. It is a good rule of construction that where an act of parliament begins with words which describe things or persons of an inferior degree, and concludes with general words, the general words shall not be extended to any thing or person of a higher degree, *Archbishop of Canterbury's case*, 2 Co. 46 *a.* Here under the head "metals" in the schedule, copper, brass, and tin are specifically enumerated. Then follow the general words, all other metals. According to the rule in the case just cited, gold and silver will not be included in these words. Besides, gold and silver are never designated in acts of parliament "metals," but as the precious metals, bullion, or specie. Plated goods are *specified after the head of "all other metals," and are [*595 subjected to the same duty. This shows that they were not considered as included. The same observation applies to "steel and steel ware." In another part of the schedule, under the head "*stones*," duties are imposed for flint stones, for chalk stone, rough and hewn, and for stone or stonework not enumerated. Would this last denomination include precious stones?

The sizer, contra. The single question is, whether the commissioners had a right to charge 10*d.* for every 10*l.* value of the cargo; and that depends upon this, whether gold and silver are included in the words "all other metals not enumerated." It is said that gold and silver have a specific denomination in acts of parliament, but that denomination is not so appropriated that they cannot be expressed by any other. Gold and silver are clearly metals, and to exclude them would be to prevent the operation of the words "all other metals." It is admitted in the cause that some duty is payable on the cargo, and this disposes of part of the argument on the other side. It is said, however, that the duty is to be only one twelfth part of the usual freight from Arundel to London. But these words apply to *goods* not enumerated; and surely it is doing more violence to ordinary expression to say that gold and silver are comprehended within the term "*goods*," than within the term "*metals*." It is undoubtedly a rule of construction that an act of parliament which treats, in the outset, of things or persons of an inferior nature, cannot by subsequent general words be extended to those of a superior. But there is no fixed scale of value for the metals. A scarcity of any one might raise *its value to that of the precious metals. [*596 There is no certain enumeration of metals of inferior value in the schedule. One hundred weight of copper or brass wrought may be more valuable than 10*l.* worth of gold or silver. The rule as to particular enumeration of inferior things, followed by general words, cannot apply, for what metals are there lower than those enumerated?

Lord TENTERDEN, C. J. I think the words "all other metals" in this act of parliament must be understood in their ordinary and popular sense; and in that sense they certainly do not include gold and silver. They are never spoken of in popular language as *metals*, but as *the precious metals*. That being so, the commissioners were not entitled to demand 787*l.* 10*s.* as dues payable on this cargo, and the plaintiff is entitled to have the verdict entered for 750*l.*

LITTLEDALE, J. Undoubtedly, gold and silver are, strictly speaking, metals; but as articles of commerce, they are never so spoken of as metals, but are described by name, or as the *precious metals*. The question is, whether they are included under the word metals in the schedule of this act of parliament. The articles upon which the duties are imposed are arranged alphabetically, and

iron, copper, and lead occur before the word "*metal*," but the precious metals are not mentioned in the schedule, either before or after that word. Under the head *metal*, the only pure metal (of ordinary occurrence) not before mentioned, is tin; for brass and pewter are alloys or compound metals. Then after the enumeration of the pure metals, and after the mention of brass and pewter, *597] there follow the words *all other metals not enumerated*. I have no doubt that those words do not include gold and silver, but refer to metals ejusdem generis with others previously mentioned under the head "*metal*;" and the metals ejusdem generis, and not already enumerated, can only be compound metals, and what were formerly called semi-metals. The plaintiff, therefore, is entitled to judgment.

PARKE, J. The word "*metals*," taken in its ordinary sense, does not include the precious metals, and I am of opinion that that word must be understood in its ordinary sense in the schedule of this act of parliament. And, according to the rule which has been referred to, I think the general words following the particular enumeration in the schedule, must be taken here as referring to an inferior class of metals, such as bell-metal, Queen's metal, &c. Besides it is a good rule of construction that where a charge is to be imposed on the subject, it ought to be done in clear and unambiguous language, and as, at all events, it is not clear that gold and silver are included in the word "*metals*," upon that ground, as well as the others mentioned, I should be of opinion that the plaintiff was not bound to pay the sum claimed by the commissioners.

TAUNTON, J. I think that the words "*metals not enumerated*," mean metals ejusdem generis with those previously mentioned, and not the precious metals.
Judgment for the plaintiff.

*598]

*SAFFERY v. JONES. June 3.

It is a good defence to an action against a sheriff or gaoler for an escape, that he discharged the prisoner from custody by virtue of an order of the insolvent debtors' court; he need not show that the proceedings upon which the order is grounded were properly taken, or that the insolvent was within the walls of a prison when he petitioned for his discharge.

THIS was an action against the marshal for suffering the escape of one Stephen Taylor, a prisoner in execution. Plea, that whilst Taylor was in the defendant's custody, he exhibited his petition to the court for the relief of insolvent debtors, by which court it was ordered, that Taylor should be discharged from the custody of the marshal, as to the detainer of the plaintiff, at the expiration of nine calendar months, to be computed from the 11th of July, 1829, the time of filing the petition; and that for so discharging him from custody as to the detainer, the said order should be the defendant's warrant; that the defendant detained Taylor in custody for nine months, and at the expiration thereof discharged him. Replication, that before the expiration of the nine calendar months, to wit, on, &c., Taylor being in custody of the defendant at the suit of the plaintiff for a sum exceeding 100*l.*, and not exceeding 300*l.*, exhibited a petition to the Court of King's Bench, praying to be discharged out of custody pursuant to the Lords' Act,^(a) and thereupon the Court of King's Bench granted a rule calling on the plaintiff to show cause why Taylor should not be discharged out of custody; that the sum due to the plaintiff was inserted in the schedule filed by Taylor in the insolvent debtors' court, as a debt due by him (Taylor) to the plaintiff, and was *599] included in the order; and that by means of the *premises, Taylor, before the escape, waived all benefit and advantage of the said order for his discharge, and elected to take and have the benefit of the Lords' Act. It then stated that Taylor was brought up to the Court of King's Bench, and that the plaintiff thereupon insisted upon Taylor being detained in prison at his suit, and

(a) 32 G. 2, c. 28, extended by 33 G. 3, c. 5.

agreed to allow him 8s. 6d. per week for such time as Taylor should continue in prison in execution, upon which Taylor was remanded to the custody of the marshal; that the plaintiff paid the sixpences regularly; but that the marshal allowed Taylor to escape. To this replication there was a general demurrer. The case was now argued by

Campbell in support of the demurrer. The replication is bad. The question raised by the pleadings is, whether an order of the insolvent debtors' court for the discharge of Taylor at the end of nine months is superseded by the proceedings alleged to have taken place under the Lords' Act. Now, the insolvent debtors' act, 7 G. 4, c. 57, s. 64, enacts, that persons who have already taken the benefit of the insolvent act, and uncertificated bankrupts, shall not be entitled to relief except in certain cases; but it says nothing of persons who have availed themselves of the Lords' Act. [Lord TENTERDEN, C. J. How can the proceedings under the Lords' Act affect the order of the insolvent court? Taylor was brought up under the Lords' Act, and was remanded by the Court of King's Bench, upon the creditor's undertaking to pay the sixpences. How does that supersede the authority of the insolvent court? The plaintiff could not deprive Taylor of the benefit of the act, if he was entitled to it by that order.]

**Follett, contra.* The two acts of parliament are inconsistent. He was discharged under the Lords' Act, on making an assignment of his property. [Lord TENTERDEN, C. J. He had assigned all his property already. The foundation of the proceedings here failed: he had nothing to assign. This Court does not remand for any given time.] As long as the sixpences are paid. [LORD TENTERDEN, C. J. The plaintiff cannot, by his interference, deprive the insolvent debtor of the benefit he is entitled to by the provisions of the act for relief of insolvent debtors. We have no doubt on that point.] Then, the plea is bad, because it does not show that Taylor was in actual custody *within the walls of a prison* at the time when he petitioned for his discharge; and if he was not, the insolvent court had no jurisdiction; for the act 7 G. 4, c. 57 (sects. 10 and 12), gives jurisdiction to that court to discharge such persons only as at the time of the petition are in lawful custody within the walls of any prison. It was incumbent on the defendant, who seeks to avail himself of the judgment of an inferior court, to show by his plea everything necessary to give that court jurisdiction, *Turner v. Beale*, 2 Ld. Raym. 1262, 2 Salk. 521, *Ladbroke v. James*, Willes, 199. [Lord TENTERDEN, C. J. In both those cases the plea was by the party discharged.] That is immaterial, for the order is no authority to the gaoler if the court which made it had no jurisdiction. In *Cotterell v. Hooke*, Dougl. 97, and *Marks v. Upton*, 7 T. R. 805, it was pleaded that the defendants were in actual custody on certain days, according to the statutes which were there in question. [LORD TENTERDEN, C. J. By sect. 81 every sheriff, gaoler, &c., of any prison, who *shall do anything in obedience to any order of the said court, &c., shall be indemnified for whatsoever shall be done by them respectively in obedience thereto; and if any action of escape, &c., be brought against such sheriff, gaoler, &c., for performing the duty of his office in pursuance of that act, such sheriff, gaoler, &c., may plead the general issue, and give this act and the special matter in evidence. That provision seems to be an answer to this objection.] That raises the same point; for the order must be one which the court had jurisdiction to make. [PARKE, J. The legislature could never have intended to throw upon the gaoler the onus of examining into the accuracy of all the previous proceedings, and that the prisoner should be detained until such examination had been made.] The court has only jurisdiction if the prisoner be confined within the walls, and that is a fact which must be known to the gaoler. [PARKE, J. He would not necessarily know that the prisoner was in custody at the time when the petition was presented to the insolvent court, unless he also knew the date of the petition. The provision that the order itself should be an indemnity to the gaoler is for the benefit of the debtor. If the order was bad on the face of it, the case might be different.]

Lord TENTERDEN, C. J. I am of opinion that the plea shows enough to

bring the defendant within the protection of the eighty-first section; for even if the insolvent court had no jurisdiction, the language of that clause is sufficiently strong to make the order of the court a protection to the gaoler.

LITTLEDALE, J., concurred.

*602] *PARKE, J. The express purpose of this section seems to be, to make the order of the court in itself a protection to the gaoler.

TAUNTON, J. The argument deduced from the nature of an inferior court would be unanswerable were it not for this eighty-first section. But for this section the gaoler was between two fires; if he did not discharge the prisoner pursuant to the order of the insolvent court, he would probably be liable to an action by him; if he did discharge him, he might be liable to an action for an escape at the suit of the creditor. This section was framed to meet that difficulty.

Judgment for the defendant.

LOVERIDGE, Clerk to the Commissioners under certain Acts of Parliament of the 41st, 43d, 55th, and 57th of GEO. 3, *v.* HODSOLL, Esq. *June 3.*

The metropolitan paving act, 57 G. 3, c. xxix., does not give the commissioners authority to take under their jurisdiction, or to make a rate for lighting and watching, the footpaths on the side of any turnpike-road within the jurisdiction of the act.

DEBT for 5*l.* 12*s.* 6*d.*, a year and a half's rates for repairing, cleansing, lighting, and watching the footways of a certain place called Haverstock Hill, in the parish of St. Pancras, Middlesex, from Lady-day 1828 to Michaelmas 1829, in respect of two houses belonging to the defendant, situate on the side of that footway. At the trial before Lord Tenterden, C. J., at the Middlesex sittings after Easter term 1830, a verdict was found for the plaintiff subject to the opinion of this Court on the following case:—

*603] The plaintiff is clerk to the commissioners acting *under several local acts of parliament, viz. the 41 G. 3, c. cxxxi., 43 G. 3, c. cxxxix., and 55 G. 3, c. xxv., and under a power contained in the general metropolitan paving act, 57 G. 3, c. xxix. The statute 41 G. 3, passed for forming, paving, cleansing, lighting, watching, watering, and otherwise improving and keeping in repair the streets, squares, and other public passages and places made and to be made upon certain pieces or plots of ground in the parish of St. Pancras in the county of Middlesex, belonging to the late Lady Southampton, now the estate of Lord Southampton. The 43 G. 3 extended the powers of the commissioners to certain other small plots of ground in the same parish, repealed the power of making rates given by the 41 G. 3, and directed the commissioners to make new rates. And by the 55 G. 3 further powers were given to the commissioners as to the levelling and paving of new streets, &c., in the same parish. The powers vested in the commissioners by those several statutes of the 41, 43, and 55 G. 3 are confined to certain parts of the estate of the then Lady Southampton, and extend northward as far as Slip-Shoe Lane (which is at some distance south of the point where the Regent's Canal crosses the Hampstead Road), and no farther, except as they may be extended by the fifty-fourth section of the metropolis paving act as hereinafter mentioned.

Part of the estate of the Dowager Baroness Southampton, not included within the powers of the said acts of parliament, lies on the north side of the Regent's Canal, towards Haverstock Hill, and terminates at the south side of a lane at the foot of Haverstock Hill, about 150 or 200 yards south of the houses of the defendant in respect of which he is rated. Between Slip-Shoe Lane aforesaid

*604] and the lane at the foot of Haverstock Hill, *but on the opposite side of the road, there is a considerable space belonging to other persons.

But the material statute upon which the question in this cause depends, is the stat. 57 G. 3, c. xxix.(a)

*In the years 1826 and 1829, two acts of parliament, 7 G. 4, c. cxlii., and 10 G. 4, c. 59, passed for consolidating the trusts of the several turn- [*605
pike roads in the neighbourhood of the metropolis north of the river Thames. The Hampstead Road, including that part of it called Haverstock Hill, is a public turnpike road in the ninth district, described in the act 10 G. 4, c. 59; and a gate stands, and toll is collected from all persons travelling on horseback or in carriages, between the defendant's premises and the metropolis; and the carriage and footways are entirely cleansed and repaired at the expense and under the direction of the parish of St. Pancras. Before the passing of the 7 G. 4, c. cxlii., the Hampstead Road, of which Haverstock Hill is a part, had been under the management of the Hampstead and Highgate road trust, who lighted and watched that line of road. After the passing of that act, at Michaelmas 1827, the commissioners acting under that trust declined continuing any further to watch and light the road; whereupon several of the inhabitants of that district made application to the commissioners acting under the local acts of 41, 43, and 55 G. 3, before referred to, whose district was and is contiguous and nearest to Haverstock Hill, to light and watch the said road. In pursuance of such application, a meeting of the commissioners was held, and it was there ordered and declared, that the Hampstead Road, northward of the Regent's Canal Bridge, and within the parish of St. Pancras, should, under the authority of the 57 G. 3, c. xxix., s. 54, be included within their jurisdiction. The commissioners, in pursuance of such resolution, immediately commenced lighting and watching the footway of that part of the Hampstead Road, including so much of *Haver- [*606
stock Hill as lies within the parish of St. Pancras, and placed lamps, for the purpose of such lighting, on the outside of the footway next to the carriage road. The last lamp put up in that line of footway was placed at about 150 or 200 yards from the defendant's houses. Such lighting and watching began in October 1827, and were continued to the time of the present action. The footpath of Haverstock Hill is not paved, except in front of the doors of some of the houses. The rate in question was made by the commissioners, for repairing, cleansing, lighting, and watching the several places mentioned in the acts of parliament, over which they claimed jurisdiction within the parish of St. Pancras, including the same line of footway on Haverstock Hill, upon the occupiers and

(a) By which it is, among other things, enacted, "that in case there shall be in any parish within the jurisdiction of the act, any streets or public places which shall not have been included in the jurisdiction of the commissioners or trustees, or other persons having a control of the pavements therein, by virtue of any local act of parliament, and which are not included in the jurisdiction of any other paving commissioners or trustees, or other persons by prescription or by any local act or acts of parliament, and it shall appear to any such commissioners, &c., to be expedient that such streets or public places should be included within their jurisdiction; then it shall and may be lawful for any such commissioners, &c., so to order and determine, and that thereafter all and every such streets and public places shall be from thenceforth included within the jurisdiction of such commissioners, &c., and that all powers and authorities of such commissioners, or trustees, or other persons as aforesaid, and of their surveyors, officers, and servants, and also the powers and provisions of the local act of parliament for such parochial or other district, and of this act, shall apply and extend thereto in the same manner as if such streets or public places or any of them had by virtue of the said local acts of parliament or otherwise, theretofore formed part of the parochial district within the jurisdiction of the said commissioners, &c., and by such local act or otherwise had been originally included therein: But provided that there shall be more than one district under the jurisdiction of separate paving commissioners, &c., in any one parish, then the powers hereinbefore given to the commissioners, &c., having the control of the pavements as aforesaid, shall and may be exercised only by the commissioners, &c., having the control of the pavements in that particular district, within any such parish, whose district shall be contiguous or nearest to any such streets or public places; or in case they shall refuse to include the same, and to order and determine as aforesaid, then by the commissioners, &c., having the control of the pavements in that particular district, within any such parish as doth contain the greatest number of messuages and hereditaments then being within any such parish as aforesaid; and may and shall not be exercised by any other commissioners, &c., whomsoever." And in sect. 147 of the same act is the following clause: "Provided also, and be it further enacted, that neither this act nor any enactment, clause, &c., herein contained, shall extend to any turnpike road or to any part of any turnpike road, whether the same shall be paved or unpaved, now being in any parochial or other district within the jurisdiction of this act, but that the same shall be completely and entirely exempted therefrom, anything herein contained to the contrary notwithstanding."

inhabitants of houses within the jurisdiction aforesaid. The statute 41 G. 3, c. cxxxi., gives the form of action, and enables the commissioners to sue and be sued in the name of their clerk.

Comyn for the plaintiff. The question is, whether the commissioners, by the 57 G. 3, c. xxix., had a right to bring Haverstock Hill within their jurisdiction for the purposes of lighting and watching, and to make a rate for those purposes on persons resident there. It will be said that the road being a turnpike road, is by sect. 147 expressly exempted from their jurisdiction. But here the rate is for lighting and watching the *footways*. They are no part of the turnpike road. [PARKE, J. Section 111 of the general turnpike act, 3 G. 4, c. 126, authorizes the trustees or commissioners under that act to make and repair causeways for the use of *foot passengers* in, upon, or on the sides of the turnpike roads, as they shall think proper; and by *sect. 112 they are not to lay *607] down, continue, repair, or maintain any *pavement*, or any paved or pitched causeway or *footpath* in, upon, or at the side of any turnpike road within any town, village, or hamlet. If the commissioners acting under the 57 G. 3, c. xxix., take this footpath into their jurisdiction, they take from the trustees under the general turnpike act the option given to them of repairing the footpaths.] The turnpike act does not oblige the trustees to light and watch: those duties are distinct from that of repairing. The jurisdiction of the commissioners under the 57 G. 3, c. xxix., extends to all streets and other public places, which then were paved or which might thereafter be so: and, therefore, it may well include these footpaths.

D. Pollock, contra. The footpath on Haverstock Hill is not a place which the commissioners had authority to take within their jurisdiction by the 57 G. 3, c. xxix., which is entitled "An Act for better paving, improving, and regulating the *streets* of the metropolis, and removing and preventing nuisances and obstructions therein;" and the act throughout relates to the pavement of those streets. The footpath in question is not paved. But even if it were, sect. 147 contains a special exemption, from the operation of that act, of all turnpike roads. The footpath is part of what was a turnpike road, and what, since 9 G. 4, is a district road. The commissioners acting under the metropolitan act had, therefore, no jurisdiction over it.

Lord TENTERDEN, C. J. On referring to the several clauses of the statute 57 G. 3, c. xxix., I am of opinion that it does not extend to any street or public *608] place *which was not paved before the passing of the act, or before the commissioners began to do any act with respect to it. The preamble recites, "that many of the streets and public places within that part of the metropolis therein described, and including the parishes of St. Pancras, &c., are divided into parochial and other districts, and are *paved*, repaired, and regulated under the direction of certain commissioners appointed to superintend and regulate the same in each of such parochial or other districts, by virtue of certain local acts of parliament; and the *pavements* of many such streets and public places are often in a state dangerous to passengers; and that it would materially tend to the remedying of such defects in the *pavements* if more summary means of compelling the speedy reparation of such streets and public places, and of enforcing due regulations as to the various water and gas companies and commissioners of sewers, by whom the *pavements* of such streets and public places have been frequently displaced; and, also, if more adequate funds and authorities were given to the said several commissioners having the superintendence and regulation of the pavements of such streets and public places;" and it is then provided, that the act shall extend to all streets and public places which were then paved, or which might be thereafter paved, within (among other places there mentioned) the parish of St. Pancras. The second section provides for the appointment in parishes of surveyors of the *pavements*, who are to superintend the *pavements*; and by sect. 6 housekeepers are to give notice of dangerous or defective *pavements* to the surveyor, and he is to cause the same to be repaired. The tenth and several following sections contain provisions calculated to remedy the evil of the

pavements being *broken up by water companies, gas companies, or commissioners of the sewers, and requires notice to be given to the surveyor [*609 before any such act be done, and the consent of the commissioners to be obtained. Sect. 24 authorizes the making of such rates and assessments as shall be necessary for paving or repairing the *pavement* of the streets and public places within the district. Every one of these sections apply to streets and places paved. It seems to me, therefore, that if the act had stopped here, the footpath in question not being a street or place paved, would not be within it. But by sect. 147 it is provided, that the act shall not extend to any turnpike road, or to any part of any turnpike road, whether the same shall be paved or unpaved, but that the same shall be completely and entirely exempted therefrom. The footpath in question, which was part of a turnpike road at the time when the 57 G. 3, c. xxix., passed, is within the proviso, and therefore, as well as for the reason before given, is exempted from the operation of the act.

LITTLEDALE, J., concurred.

PARKE, J. The commissioners, by sect. 54, have the power to take certain places therein mentioned into their jurisdiction. The place in question was not paved when the act passed, nor is it now; and it is perfectly clear that the act is confined to places then paved, or thereafter to be paved; but if there could be any doubt on the subject, it is wholly removed by sect. 147, for Haverstock Hill is and was, no doubt, a turnpike road. It is said, indeed, that, although the body of the road be a turnpike road, the footpath is no part of it; but I think the footpath is a part of the road, and I have already *referred to [*610 a clause in the general turnpike act, which manifestly shows it to be so.

TAUNTON, J. The authority given to the commissioners by sect. 54 is confined to streets or places then or thereafter to be paved; and by sect. 147 it does not extend even to them when they form a turnpike road, or part of one. The road in question is stated to be a public turnpike road, and the footpath is not paved; but it is said, that the footpath is no part of the road. To that I cannot agree. A footpath by the roadside, included within the hedge or fence of the road, is as much part of the public highway as that which is travelled over by carriages. The 111th section of the general turnpike act referred to by my Brother PARKE, shows that of necessity the footpath must form part of a turnpike road. If it were otherwise, the inconvenience would be great indeed: for the footpath might be under the government of one set of commissioners, and the carriage way of another. Judgment for the defendant.

*The KING v. WILLIAM JONES. June 4.

[*611]

The act 9 G. 4, c. 41, provides, that no person (not a parish patient) shall be taken into any house for the reception of lunatics, without a certificate of two medical practitioners, containing certain particulars. Sect. 30 enacts, that any person who shall *knowingly and with intention to deceive*, sign any such certificate untruly setting forth such particulars, shall be guilty of a misdemeanor; and likewise, that any physician, surgeon, &c., who shall *sign* any such certificate *without having visited and personally examined the patient*, shall be guilty of a misdemeanor. An indictment charged that the defendant, a surgeon, *knowingly and with intention to deceive*, signed a certificate required by the act, *without having visited and personally examined the patient*, contrary to the statute. The jury negatived the intention to deceive, and found the defendant guilty, subject to the opinion of the Court upon the case: Held, that in the description of this offence, the averment of intention was surplusage, and that such unnecessary matter might be rejected, as well in an indictment on a penal statute as at common law.

INDICTMENT on 9 G. 4, c. 41, s. 30. The act directs (s. 29), that no person, not being a parish patient, shall be received into any house for the reception of insane persons in England, without a certificate in the manner required by the act. Section 30 provides that every certificate for the confinement of any person in such house shall be signed by two medical practitioners "who shall have separately visited and personally examined the patient." It then prescribes the

several particulars to be stated in such certificate, and enacts that "any person who shall, *knowingly and with intention to deceive*, sign any such certificate, *untruly setting forth any such particulars* required by this act, shall be deemed guilty of a misdemeanor;" and, after two other clauses (which are not material), it goes on to provide that "any physician, surgeon, or apothecary who *shall sign or give any such certificate without having visited and personally examined the individual* to whom it relates, shall be deemed to be guilty of a misdemeanor."

The indictment stated that the defendant, being a surgeon, did unlawfully, *knowingly, and with intention to deceive*, sign a certain certificate required by the act (which was particularly described in some of the counts), *without having* *612] *visited and personally examined the *individual* (not being a parish patient) to whom the said certificate related, against the form of the statute, &c.

At the trial before Lord Tenterden, C. J., at the sittings for Middlesex before Michaelmas term 1830, it appeared that the defendant had not himself seen the patient for a considerable time before the certificate was signed, but that his partner visited and examined her, and thereupon signed a certificate, containing the various statements required by the act, and sent it to the defendant, who added his signature. The jury negatived any intention to deceive, but found the defendant guilty, subject to the opinion of this Court upon a special case, containing what is, in substance, here stated. A verdict of guilty or of not guilty was to be entered according to the decision of the Court. The case was now argued by

Law for the crown. The defendant is, in fact, found guilty of an offence against the latter part of 9 G. 4, c. 41, s. 30, in having signed a certificate of the nature there mentioned without having visited and personally examined the patient. But the indictment adds that he did so knowingly and with intention to deceive, and this the jury have negatived. The question is, whether this allegation may not be rejected as immaterial. Where the law forbids a thing to be done, the doing it wilfully, though no corrupt intention be charged, is a complete offence. This is laid down by Ashhurst, J., in *Rex v. Sainsbury*, 4 T. R. 451. The averment of intention in this case was merely formal; it was an unnecessary statement of an inference of law. Where the act is indifferent in *613] itself it is material to allege and prove the **intention*, 1 Stark. Crim. Pleading, 2d edit. 180; but not otherwise. The intent is no part of the statutable definition of the offence for which the defendant was indicted, though it is of another and distinct offence prohibited in the same section. In *Scofield's case*, 2 East's P. C. 1028, the defendant was indicted for having laid combustibles with intent *feloniously* to set fire to a house, but it appearing that the house was in his own possession, so that his burning it would not have been felony, the Court held that the charge of a *felonious* intent might be rejected as surplusage, and the defendant convicted of having done the act with intent to commit a misdemeanor. And in *Rex v. Dawson*, Stark. on Ev. part iv. p. 1586, it was held, that a part of the intent charged being negatived by the jury, that part might be rejected, and the defendant convicted on the remaining portion of the charge. So in this case the allegation of intent, if objectionable, may be treated as surplusage.

Platt, contrd. The averment of intention is erroneous, and cannot be rejected. When an indictment is framed on a statute, the offence must be so charged as to come within the definition which the statute furnishes. This indictment appears to have been designed to meet the first penal clause of sect. 30, which applies to acts committed with a guilty intent; the second clause is referable only to acts done without such intent, and where the party may perhaps suppose that he is warranted in what he does. [Lord TENTERDEN, C. J. Can a man tell a falsehood with any good intent? The statute in this clause leaves out the *614] words "*knowingly and with *intention to deceive*;" but it must at least be within a man's knowledge, when he signs a certificate, whether he has visited and examined the patient or not.] At all events, the second branch of

the section is meant to describe a distinct offence; and this indictment, by the manner in which the intent is charged, applies, not to that clause, but to the former, and to the offence there pointed out. [PARKE, J. Words of surplusage may be rejected in an indictment at common law; why not in an indictment on a statute?] It is laid down in Foster's Crown Law, pp. 423, 424, that "indictments grounded on penal statutes must pursue the statute so as to bring the party precisely within it; and that the fullest description of the offence, were it even in the terms of a legal definition, would not be sufficient without keeping close to the words of the statute."

LORD TENTERDEN, C. J. Is there any authority for saying that, if an indictment on a statute contains matter unnecessary to the description of the offence,—if it charges the statutable offence, and something more, it is therefore not maintainable? In the absence of such authority this objection must fail. If this indictment had charged the defendant with having certified that the patient was a proper person to be confined, whereas he did not believe her so to be, or with having stated in his certificate any other particular required in the act, knowing it to be untrue, the case, upon the present finding of the jury, would have been different. But the allegation in the indictment is, that he signed the certificate without having visited and examined, which is all that the statute requires to constitute the offence; and that charge is not affected by the finding.

*LITTLEDALE, J. If this had been an indictment on the first of the clauses in question, the prosecution would have failed, because in that [*615 case it would have been necessary to prove the intent; but the second clause, upon which this indictment is framed, omits the words "knowingly and with intention to deceive;" nor does it appear necessary that they should have been introduced; for a man who signs the certificate required by this act without having visited the patient, must do so knowingly, and an intention to deceive might reasonably be inferred. It is said, however, that if the words "knowingly and with intention to deceive" are introduced in charging this latter offence, the averment must be proved; whereas in this case it is negatived by the jury. But if such words, being merely surplusage, might be rejected in a common-law indictment, why may they not where the indictment is on a statute? It is true that Mr. Justice Foster says, that such indictments must pursue the statute, so as to bring the party precisely within it. But that is done here, only an additional averment is introduced; and the whole question is, whether that must necessarily be proved. I think there is no such necessity.

PARKE, J. I am of the same opinion. The particular offence which is the subject of the second clause, is charged in this indictment, only a circumstance is added, which is not necessary to constitute the offence. It is quite clear that that may be rejected. The same course is constantly pursued with indictments for murder and burglary, where, the capital charge not being made out, a part of the matter alleged in the indictment is passed over, and a conviction takes place upon the rest.

*TAUNTON, J. Two species of misdemeanor are constituted by the twentieth section of the act. To the offence first described, knowledge [*616 and an intention to deceive are essential; but the second clause makes it a substantive offence to certify without having visited, independently of knowledge or intention. The objection to this indictment on the latter clause is, not that the offence is charged with less fulness than was requisite, but with more. But if the averment which has been added to the statutory description of the offence be unnecessary, there is no reason that it should not be rejected. A man may be convicted of manslaughter on an indictment for murder, and of larceny on an indictment for burglary; and where an assault is charged with certain intents, the party may be found guilty of assaulting with only one of the intents alleged. These are stronger cases than the present, especially the first two, where the words rejected imply a great aggravation of crime, and call for a much higher punishment.

Judgment for the crown.

The KING v. The Inhabitants of LLANGUNNOR.

An unstamped assignment of a parish apprentice stated that D. E., the new master, in consideration of 3*l*. 10*s*. paid him by H., the old master, agreed to accept the apprentice, &c.: Held, that parol evidence was admissible to show that the money paid on the assignment of the apprentice was parish money; and therefore, that the instrument did not require a stamp.

UPON appeal against an order of two justices, whereby Hannah Thomas, widow, and John her son, aged three years, were removed from the borough of Lloughor, in the county of Glamorgan, to the parish of Llangunnor, in the county of Carmarthen, the sessions confirmed the *order, subject to the *617] opinion of this Court on the following case:—

The pauper was the widow of one John Thomas, whose last settlement was admitted to be the settlement of the pauper and her son. John Thomas, when fourteen years of age, was put out apprentice by the parish officers of Llangendeirne, in the county of Carmarthen, under an indenture, to which those officers were parties, dated the 24th of October, 1814, and containing the usual covenants, to one John Morgan a tailor, in the parish of Llanelly in the same county; he afterwards removed with his master to the parish of Llanon in the same county, and there continued to serve under the indenture more than forty days. Morgan, whilst in Llanon, became poor, and Thomas then went, by an assignment, on which the questions in this case arose, to serve David Elias, a tailor, in the parish of Llangunnor in the said county of Carmarthen, and there served more than forty days. The indenture was made the 24th of October, 1814, and witnessed that A. B. and C. D., churchwardens, and E. F. and G. H., overseers of the poor of the parish of Llangendeirne in the county of Carmarthen, with the consent of two justices for the county, bound John Thomas, aged fourteen years, a poor child of the said parish of Llangendeirne, an apprentice to John Morgan of Blaenyddoygiven, in the parish of Llanelly, tailor, from the date thereof, until the apprentice should attain the age of twenty-one years. The indenture was in the usual form. By the assignment, bearing date the 16th of December, 1818, it was witnessed that John Morgan, with the consent of D. P. and M. J., two of his majesty's justices of peace for the said county, whose *618] names were subscribed to the *consent thereunder written, did thereby assign John Thomas, the apprentice, to David Elias, of the parish of Llangunnor in the said county of Carmarthen, tailor, to serve him during the residue of the term of twenty-one years, mentioned in the indenture, and that the said David Elias, in consideration of 3*l*. 10*s*. paid him by John Morgan, did agree, accept, and take the said John Thomas as an apprentice for the residue of the said term, and did acknowledge himself to be bound by the covenants on the part of John Morgan to be performed, &c. On the production of these instruments in evidence for the respondents, the appellants objected that the assignment could not be received in evidence for want of a stamp, as it purported to be an assignment in consideration of a sum of money paid by Morgan to Elias. The respondents tendered parol evidence to prove that, although the consideration money therein specified was alleged to be paid by Morgan, yet it was, in fact, the money of the parish of Llanon, where Morgan and his apprentice then resided, and paid by the parish-officer to Elias. The appellants objected to the reception of such evidence. The sessions, however, determined to receive it, and David Elias being called, said that he received 3*l*. 10*s*. from Thomas Evans, as the consideration money for taking the apprentice. Thomas Evans said that he was a deputy overseer in Llanon in 1818, when the assignment took place, and that he then paid 3*l*. 10*s*. of the *parish moneys* of Llanon to Elias for receiving Thomas as an apprentice. The sessions confirmed the order, subject to the opinion of this Court on the question, whether they ought to have received the parol evidence.

*619] *F. Pollock in support of the order of sessions. Parol evidence of the money having been money of the parish of Llanon was admissible.

because other considerations than those mentioned in the deed may be proved. *Rex v. Scammonden*, 3 T. R. 474. Assuming, therefore, that the deed imports that the money paid was the money of Morgan, still evidence was admissible to show that other money was paid by the parish-officers. But in fact the deed imports only that the money was paid by Morgan, not that it was his money. The parol evidence did not contradict the written instrument, but merely established an independent collateral fact, viz. to whom the money originally belonged, and upon that ground it was admissible. *Rex v. Laindon*, 8 T. R. 379. [PARKE, J. *Rex v. Skeffington*, 3 B. & A. 382, seems to be an authority to show that the recital in the indenture would not of itself be proof that the premium was paid out of charitable funds.]

Campbell and Kelly, contra. The parol evidence was inadmissible, because it contradicts the fact stated in the assignment, that the money paid was the money of John Morgan; for that is the fair import of the statement, that it was paid by him.

LORD TENTERDEN, C. J. Upon the authority of the cases of *Rex v. Scammonden*, 3 B. & A. 382, and *Rex v. Laindon*, 8 T. R. 379, I am of opinion that the parol evidence was receivable: and as John Evans swore positively that the money was money of the parish, and he is not contradicted, I think the proof was sufficient, and, consequently, that the *assignment did not require [*620 any stamp to render it admissible.

LITLEDALE and PARKE, Js., concurred.

TAUNTON, J. It is stated in the assignment that "the said David Elias, in consideration of 3*l.* 10*s.* paid to him by John Morgan, did thereby agree to accept and take the said John Thomas as his apprentice." All that is stated with certainty is, that the money was paid by Morgan, but whose money it was does not appear. That is a collateral matter, and parol evidence was admissible to explain it.

Order of sessions confirmed.

The KING v. The Inhabitants of HELSHAM. June 4.

Pauper, on the 1st of Nov. 1813, came to reside on a tenement of the yearly value of 10*l.* The bargain with the owner was, that the pauper should live a month in it for nothing, on trial; and that if, on that trial, he liked it, he should take it at Martinmas at the yearly rent of 14*l.* The pauper resided on it for a month on trial, and then took it at the rent agreed upon, and without any interruption in the residence continued on it for the following month: Held, that he thereby gained a settlement.

ON appeal against an order of two justices, whereby Richard Wray and Winifred his wife were removed from the township of Market Weighton in the East Riding of Yorkshire to the township of Helsham in the same riding, the court of quarter sessions confirmed the order of removal, subject to the opinion of this Court on the following case:—

On the 1st of November, 1813, the pauper, Richard, being then legally settled in the appellant parish of Helsham, came to reside on a tenement in the parish of Sculcoates of more than the yearly value of ten pounds. He entered upon it a fortnight after Michaelmas. The *bargain with the owner of [*621 the tenement was, that the pauper should live a month in it for nothing on trial; and that if on that trial he liked it he should take it at Martinmas, at the yearly rent of 14*l.* The pauper resided upon it for a month on trial, and then, according to the agreement above mentioned, took it at Martinmas at the yearly rent of 14*l.*, and without any interruption in the residence continued on it for the following month. He then quitted the parish altogether, and did not subsequently acquire any settlement elsewhere.

Archbold in support of the order of sessions. The question is, whether the pauper is to be considered as having come to settle on the tenements in Sculcoates

on the 25th of October or the 23d of November? If on the 25th of October, then he has resided on the tenement more than forty days after he came to settle, and has gained a settlement; but if he only came to settle on the 23d of November, he has not resided a sufficient time. Mere residence is not sufficient to satisfy the words of the stat. 13 & 14 Car. 2, c. 12, s. 1, "coming to settle," but it must be coupled with an intention of residing on the tenement permanently. Detention by an accident, for instance, would not satisfy the statute. Here, for the first month, the pauper had the premises on trial only, without any intention of residing on them permanently. During that time he cannot be considered as having come to settle. (He was then stopped by the Court.)

Blackburne and R. Hildyard, contra. The coming to settle contemplated by 13 & 14 Car. 2, c. 12, s. 1, is not necessarily a coming to settle with a view to
 *622] permanent residence. Such a construction is not only at variance with the object of that act, as set forth in the preamble, but unsupported also by the interpretation put upon it by a long course of decisions. The preamble recites, "that by reason of some defects in the law, poor people are not restrained from going from one parish to another, and therefore do endeavour to settle themselves in those parishes where there is the best stock, the largest commons or wastes to build cottages, and the most woods for them to burn and destroy, and when they have consumed it, then to another parish, and at last become rogues and vagabonds." The preamble, therefore, does not contemplate a permanent but a temporary residence. The act then proceeds to give to two justices, on complaint, power to remove any person "coming so to settle as aforesaid," and likely to become chargeable, if the tenement be under the yearly value of 10*l*. Whatever, therefore, was the precise meaning which the legislature intended should attach to the words "coming to settle," permanency of residence was clearly not in its contemplation. They evidently apply to persons who come to seek a harbour for a time. The act does not give a settlement to persons who may have taken tenements above 10*l*. value; it merely makes those removable who come to settle on tenements below that value, while it leaves the others irremovable, as both were before the statute, independently of the length of time for which they intended to reside. Neither is the argument on the other side supported by the interpretation which this statute has received by a long course of decisions.

*623] In *Rex v. Lakenheath*, 1 B. & C. 531, it is true, Bayley, J., is reported to have said, "That at all events the pauper came to occupy as tenant at will, with a view to permanent residence, and that is a coming to settle upon a tenement within the meaning of the statute." But this interpretation of the words of the 13 & 14 Car. 2 was not called for in order to support the judgment he was pronouncing, and is not deducible from *Rex v. Fillongley*, 1 T. R. 458, by which case the decision in *Rex v. Lakenheath* was governed. In *Rex v. Hooe*, 4 East, 367, Lord Ellenborough says, "Where there is a tenement of sufficient value, and a tenant not removable, who is liable to all the burthens of a tenant, and has all the rights of one, and against whom, as such, every proceeding in law may be had, he gains a settlement by forty days' residence on such tenement." The occupation, it is true, must be coupled with an interest as tenant. *Rex v. Bowness*, 4 M. & S. 210. The occupation of a servant, as such, will not suffice. *Rex v. Seacroft*, 2 M. & S. 472, *Rex v. Kelstern*, 5 M. & S. 136, and *Rex v. Cheshunt*, 1 B. & A. 473. But if there be the interest of a tenant, though the tenancy be on mere sufferance, that is a coming to settle; *Rex v. Fillongley*, 1 T. R. 458. To insist upon an intention to reside permanently, as necessary to this kind of settlement, would be to introduce a fresh condition not recognised by any former case. Another important consequence would result from such a decision. It is under the 13 & 14 Car. 2, c. 12, that magistrates have the power to remove persons coming to settle upon tenements under 10*l*. If that means
 *624] coming to settle permanently, in the case of persons taking tenements above the value of 10*l*., it must have the same meaning where the tenement is below that value. The proposed limitation, therefore, will operate as a limitation of the magistrates' power to remove. Here there was a coming to

reside on a tenement of 10*l.* value in the parish of Sculcoates, under a bargain with the owner of the tenement, constituting the relation of landlord and tenant, and a residence of forty days under that bargain. The first month, it is true, was on trial, and no rent was to be payable for that month. But the relation of landlord and tenant did not the less exist on that account. During that month the landlord could not have removed the pauper, nor at the end of it, if he elected to continue tenant on the terms prescribed. Had a burglary been committed, the dwelling-house must have been described in an indictment as the dwelling-house of the pauper; and he might, in case of injury to the tenement, have brought trespass. The Court then called upon

Archbold. The words, "coming to settle" *prima facie* import coming to a place with an intention permanently to reside. The first section of the 13 & 14 Car. 2, c. 12, authorizes justices to remove poor persons likely to become chargeable within forty days after *coming to settle as aforesaid*. Those words, by reference to the preceding recital, import persons who have been induced to attempt to settle themselves in places by reason of there being the best stock, and the largest commons or waste to build cottages upon. Now, persons induced to settle so in any place, must have done so with at least an apparent intention of residing permanently. Mere *residence may, per se, be presumptive evidence of an intention to come to settle; but it may be rebutted by evidence to a [*625] contrary effect, i. e. by showing (as in this case) that the pauper had not, at the time when he came to the parish, formed an intention of continuing there. Till the expiration of the first month he cannot be deemed to have come to settle. He had a mere permission to use the premises for the first month; and *Rex v. St. Michael's, Coventry*, 15 East, 567, shows that that will not confer a settlement. [Lord TENTERDEN, C. J. There the pauper did not occupy as tenant; another person was the actual tenant.]

Lord TENTERDEN, C. J. I am of opinion that the pauper gained a settlement in Sculcoates. It is clear that he actually resided there more than forty days on a tenement of the yearly value of 10*l.* Then it is said, that when he first came there, he had not an absolute intention to settle for so long a time as forty days, but that it was his intention to try whether the premises would suit him; and if they did, then to stay for a year. There is no authority to show that the original intent of the party must be absolute and unqualified to continue for forty days, and I am unwilling to introduce a new term or condition to the gaining of a settlement by coming to settle on a tenement. Here the intention of the pauper was to stay for one month certain, and perhaps for a year; and it has been properly observed, that the recital in the statute 13 & 14 Car. 2, c. 12, does not import a permanent intent, but applies only to persons coming to settle for a short time.

*LITTLEDALE, J. The statute 13 & 14 Car. 2, c. 12, does not require [*626] that the party should come to settle permanently, or should make a contract to occupy for a year. The time for which the tenement is taken is unimportant, provided there be an occupation for forty days. Accordingly, taking land from June till Lady-day following, or a house for five months, or a room for a week, has been held sufficient. *Staunton-under-Barndon v. Ulescroft*, Burr. S. C. 558, *St. Matthew's, Bethnal Green, v. St. Botolph's*, Ib. 574, and *Rex v. Whitechapel*, 2 Bott, 132, pl. 187. The question really is, whether the party, after he came to the tenement, was irremovable, and whether he resided there forty days? Here it depended on himself whether or not he would remove during that time. If he chose to continue after the first month, he might do so by the terms of his contract, and he elected to continue, and did reside forty days. He therefore gained a settlement, having an interest as tenant during the whole of that term. In *Rex v. Netherseal*, 4 T. R. 258, Ashhurst, J., says, that in order to acquire a settlement by taking a tenement of 10*l.* a year, it is not absolutely necessary that there should be an express contract for the tenement: it is sufficient if the tenant reside forty days on a tenement of such a value with the permission and consent of the landlord; for in such case the law implies a con-

tract. Here the pauper resided during forty days with the consent of the land lord, and therefore gained a settlement.

PARKE, J. My first impression upon reading this case was that no settlement *627] was gained by the pauper *in Sculcoates; that in order to gain a settlement by coming to settle, there must be an intention to reside permanently; but I am now satisfied I was wrong. The question turns upon the meaning of the words "coming to settle," and some light may be thrown on that point by the resolution of the Judges of assize in 1633.(a) One of them was, that "the law unsettleth none who are lawfully settled, nor permits it to be done by practice or compulsion; and every one who is settled as a native, householder, sojourner, an apprentice, or servant for a month at the least, without a just complaint made to remove him or her, shall be held to be settled." It would appear, therefore, from that resolution, that the word *settle* did not impart anything permanent. Here it is clear, that the pauper's original intention was to reside for a month at least; and, in fact, he resided for two months, and in the character of tenant. He had an interest during the first month, though no rent was to be paid, and he afterwards had an interest in the premises for a year, and he resided during forty days, having during that time an interest as tenant. A person coming into a parish casually for some temporary purpose will not thereby acquire a settlement; but a person coming to reside in a house with a purpose of making it his home, and continuing there for forty days, does, by that residence, become settled.

TAUNTON, J. The statement in the case, that the pauper was to live in the house a month on trial created an impression in my mind that he had no inte- *628] rest in the premises during the first month, sufficient to confer a *settle- ment, but I am now satisfied that in that respect I was wrong. It appears from the case that the bargain was, that the pauper should live a month in the house for nothing, on trial; and if on that trial he liked it, he should take it at Martinmas at the yearly rent of 14*l*. The intention was, to ascertain whether the house would suit him, but at all events he was to have it for a month. The occupation during that month was by leave and license of the owner, who could not lawfully disturb him; he then took it for a year at a certain rent, and occupied it for a month, and the two occupations may be coupled together so as to make up the forty days. There are many cases to show that a tenant at will or by sufferance, not paying any rent, may gain a settlement by residing on a tenement.

Order of sessions quashed.

(a) See 1 Nol. P. L. 273.

DOE on the demises of YOUNG, and of BEALE and Wife, v. SOTHERON and RAY. June 6.

Devise to Margaret and Elizabeth, and the survivor of them, their heirs and executors for ever, gives a joint-tenancy in fee, and not estates for life with remainder in fee to the survivor.

A fine was levied of thirty messuages, forty cottages, and four acres of land. In the deed to lead the uses, the premises were described as a piece of ground containing so many feet in length and in breadth; and "all those several messuages, dwelling-houses, tenements, warehouses, shops, coach-houses, and all and singular erections and buildings whatsoever, erected and built upon" the said piece of ground. When the fine was levied there were on the piece of ground two or three cottages and forty-nine dwelling-houses; and there was the same number of each when the ejectment was afterwards brought for 'he premises on behalf of parties claiming by virtue of the fine:

Held, that as the whole number of buildings claimed did not exceed the number of the messuages and cottages named in the fine, and the intention evidently was that all should pass, the title of the lessors of the plaintiff was well sustained by such fine.

A fine may be levied of a cottage, eo nomine, and a messuage will pass by that name.

EJECTMENT for sixty messuages and six cottages, and likewise for an undivided moiety of the same. Demises, March 2d, 1825. At the trial before

Lord Tenterden, C. J., a verdict was found for the plaintiff, *subject to the opinion of this Court upon the following case:— [*629]

Joseph Lycett, being seised in fee of the premises in question, devised, after charging his estate with certain legacies and annuities, as follows: "I give and bequeath all my real and personal estate, of what kind soever, unto my sister Margaret Sockwell, wife of Thomas Sockwell, and Elizabeth Sockwell, daughter of the said Thomas and Margaret, jointly, in trust for the uses above mentioned; and do appoint them executrixes of this my will, and do give them the residue or remainder of all my real and personal estate, to them and the survivor of them, their heirs and executors for ever."

The testator died in 1775, and thereupon Thomas Sockwell and Margaret his wife, and Elizabeth their daughter, took joint possession of the premises. In 1778 Elizabeth Sockwell, in contemplation of a marriage between her and one Henry Barker, which took place in the same year, conveyed her moiety to trustees, to her own use and that of her heirs, until the marriage; and afterwards to the use of herself and her husband during their lives, and that of the survivor of them; and afterwards to the use of the trustees for a term of 1000 years, on certain trusts which never took effect; and, ultimately, to the use of herself and her said intended husband, their heirs and assigns for ever.

In 1779 Thomas and Margaret Sockwell executed a deed to lead the uses of a fine to be levied by them to Henry Barker, of Margaret Sockwell's moiety of the messuages and cottages whereof she was seised in fee under the will of Joseph Lycett. In the covenant for levying the fine, the premises were described as an *undivided moiety of and in a piece or parcel of ground situate in the parish of St. Luke, Middlesex, containing in length, from east to west, [*630] 720 feet of assize (more or less), and in breadth, from north to south, 250 feet (more or less); "and also of and in all those several messuages, dwelling-houses, tenements, warehouses, shops, coach-houses, and all and singular erections and buildings whatsoever erected and built, standing and being in or upon the said piece or parcel of ground, or any part thereof (late the estate of the said Joseph Lycett deceased), with the appurtenances." The fine was to enure to the use of such person, and for such estate, and to such intents and purposes, &c., as Margaret Sockwell, notwithstanding her coverture, and whether sole or married, should, by deed or by her will, appoint; and, in default of such appointment, or on the determination of any interest thereby created, to the use of the said Margaret Sockwell, her heirs and assigns. The fine was levied in Hilary term, 1780, of "a moiety of *thirty messuages, forty collages, thirty gardens, and four acres of land*, in the parish of St. Luke, Old Street."

In 1786 Margaret Sockwell, by her will, recited to be made in pursuance of the power reserved to her by the indenture of 1779, devised her moiety of the premises therein comprised (subject to certain legacies and other charges) to her son-in-law, the said Henry Barker, his heirs and assigns. Her husband, Thomas Sockwell, was then living. She survived him, and died in 1793.

Elizabeth Barker bore a child in March 1780, which died very soon after; and she died in April 1780. The lessors of the plaintiff, John Smith Young and Elizabeth Ann Beale, are co-heirs at law of Joseph Lycett, and *of Margaret Sockwell and Elizabeth Barker, and co-heirs at law, ex parte [*631] materna, of the infant child of Henry and Elizabeth Barker.

When Mr. and Mrs. Sockwell took possession of the estate (about 1777), there were sixty dwelling-houses standing. Two or three houses were afterwards built for Mrs. Sockwell, and one other large house was also erected on the site of two that were taken down. On a view taken a little before the trial of the cause there were forty-nine houses in the front and two or three cottages at the back; and there were as many in 1779 and 1780 as at the time of the view.

If, upon this case, the Court were of opinion that the fee simple of the entirety of the premises passed to Henry Barker, a nonsuit was to be entered;

if otherwise, the plaintiff was to have a verdict for the whole, or a moiety, as the Court should direct. The case was argued on a former day in this term.

Campbell for the plaintiff. Nothing passed to Henry Barker, and both moieties vest in the lessors of the plaintiff. If Margaret and Elizabeth Sockwell took, by the will of Joseph Lycett, as joint tenants in fee, it must be admitted that Elizabeth, by the deed of 1778, disposed of her moiety, and the lessors of the plaintiff cannot claim it. But the devise here is to Margaret and Elizabeth and the survivor of them, their heirs and executors for ever. It therefore falls within the dictum of Lord Hardwicke in *Stones v. Heurtly*, 1 Ves sen. 165, "that in a grant, habendum to A. and B. and their heirs, they are joint *632] tenants, but the inheritance is in both; but if the *habendum be to A and B. and the survivor, and the heirs of such survivor, till the death of one, the inheritance is in abeyance." The words in the present case are different, but not essentially; "their heirs" cannot mean the heirs of both; it must be meant to signify the heirs of whichever may survive. The words, referring as they do to survivorship, cannot be said to constitute a tenancy in common; but if they did, the same difficulty would arise. In *Vick v. Edwards*, 3 P. Wms. 372, where a devise was to two and the survivor of them, and to the heirs of such survivor, in trust to sell, it was considered that the trustees had not the fee, for the remainder in fee could only be vested in the survivor, and it was uncertain which would survive. In the case *In re Harrison*, 3 Anst. 836, similar words were used; and it was held that no fee vested in the trustees till all but one should be dead.(a) If, then, the words of Joseph Lycett's will are not distinguishable in effect from the words used in these cases, it follows that Margaret and Elizabeth took only estates for life, with a contingent remainder in fee to the survivor; and Elizabeth could not, while both were living, sever and convey the fee simple of her moiety.

So, too, as to the fine levied by Margaret; as Elizabeth was living at the time, it could have no effect upon the fee. If, indeed, Margaret had had no interest whatever, the fee might be said to have passed by way of estoppel; but she had a life-interest on which the fine operated; and where any interest is conveyed from the party there can be no estoppel against him.(b)

At all events the fine is void for uncertainty. The deed to lead the uses *633] gives a sufficient description of the *premises; but the fine speaks only of *thirty messuages, forty cottages, thirty gardens, and four acres of land*. Messuages will not pass by the name of cottages; and that being so, the number of messuages stated in the fine is not large enough to cover the premises claimed by virtue of it. If, indeed, the fine had been only meant to apply to a part of the premises, that might have been explained by evidence (as in *Doe dem. Bulkeley v. Wilford*, 1 C. & P. 284), and the fine might have been held sufficient; but here no such evidence is offered, and if the fine is not good for the whole premises, it is not good for any part. In 5 Cru. Dig. p. 145, tit. *Fine*, ch. vii. 22, it is stated as laid down by Judge Jenkins (Cent. 6, ca. 45) that more acres of land do not pass by a fine than the fine mentions, although the indenture that leads the uses of it mentions more acres than are in the fine. Cruise adds, that the Court would probably amend the fine; but that shows his opinion, that without amendment it would be insufficient.(c) [TAUNTON, J. Will not the "four acres," mentioned in the fine, carry the buildings, whatever they may be, erected on the land?] To describe several streets of messuages and cottages as four acres of land would be too loose. It has been held, that the term "land," in a fine, without more, will not carry pasture.(d) [TAUNTON, J. In *Webber v. Grey*, 5 B. Moore, 94, it was held that land, though *634] in fact woodland, would pass *under the name of "arable," and that

(a) See Mr. Butler's note (78) on Co. Litt. 191 a.

(b) Co. Litt. 45 a.

(c) He relied upon this passage with reference also to another objection, that the quantity of land mentioned in the fine fell short of that described in the deed to lead the uses; but this was afterwards abandoned, it appearing on calculation that there was no important variance.

(d) See the references in *Cooke v. Yates*, 4 Bingh. 90; which case, however, is contra.

The KING v. The Inhabitants of BATHWICK. June 6.

Upon a question as to the settlement of Elizabeth, the wife of C., the respondents proved by the testimony of C. his marriage with the pauper in 1829. The appellants in order to prove that that marriage was void, on the ground that he had been married in 1826 to M. B. called the latter, who stated that she in 1826 went with C. before a reputed clergyman of the established church, in Ireland, who in his private house there read to them the marriage ceremony. A document was also produced, purporting to be W.'s letter of orders signed in 1799 by the then Archbishop of Tuam, which was proved to have been among W.'s papers at the time of his death in July 1829:

Held, first, that M. B. was a competent witness to prove the first marriage, although her husband had been before examined, and proved the second marriage.

Secondly, That the certificate of the ordination of W. was properly received in evidence, having come from the proper custody, and being more than thirty years old; and that, the certificate not being the act of any court, and not having any relation to the corporate character of the Archbishop, the seal was to be considered the seal of the natural person, and not of the corporation. Had it been of the latter character,

Quære, whether it would have been admissible without evidence that it was the proper seal?

UPON an appeal against an order of two justices, whereby Elizabeth, the wife of William Joliffe Cook, was removed from the parish of Bathwick, in the county of Somerset, to the parish of St. Pancras, in the county of Middlesex, the sessions quashed the order, subject to the opinion of this Court on the following case:—

The respondents proved by the testimony of the said William Joliffe Cook, his settlement in St. Pancras, and his marriage with the pauper at Bath in 1829, and he stated her to be now his wife. The appellants insisted that the marriage was void, the said Wm. Joliffe Cook having been previously married in Dublin in 1826, to Mary Byrne; and, to prove their case, they called the said Mary, to whose competency the respondents objected. The Court having admitted her evidence, she proved that she, being a Roman Catholic, and *Cook, being a Protestant, went on the 21st of May, 1826, before Mr. Wood, a clergyman residing in Dublin, who, in his private house, read to them the marriage ceremony, and in the course of it asked her whether she would be the wife of Cook, and asked him whether he would be her husband, to which question both of them answered, I will; and after the ceremony they returned to the house of Cook's father, whose servant she was, and there secretly cohabited for two months and upwards. It was proved by parol that Wood was reputed to be a clergyman of the established church, and the appellants put in a document purporting to be the letters of orders signed and sealed by William, late Lord Archbishop of Tuam, dated the 18th of October, 1799, whereby the archbishop certified that he had ordained Wood a priest, and which letters were proved to have been among Wood's papers at the time of his death, in July 1829. The respondents objected to the admissibility of these letters; but they were admitted by the Court without proof of the handwriting or seal of the archbishop, as being more than thirty years old. [*640]

Jeremy and *Erle* in support of the order of sessions. Here there was a contract per verba de præsenti, and that, if not affected by any statutory restraint, constitutes a valid marriage, *Jesson v. Collins*, 2 Salk. 437, *Wigmore's case*, 2 Salk. 438. In *Dalrymple v. Dalrymple*, 2 Hagg. Consist. Rep. 54, Lord Stowell says, that the consent of two parties expressed in words of present mutual acceptance formerly constituted an actual legal marriage; and the same learned Judge, speaking of the general canon law of Europe before the council of *Trent, says that that law, "although, in conformity to the prevailing theological opinion, it revered marriage as a sacrament, still so far respected its natural and civil origin, as to consider that where the natural and civil contract was formed, it had the full essence of matrimony without the intervention of the priest." (a) *Steadman v. Powell*, 1 Addams's Rep. 58, shows, that it [*641]

(a) The position that a matrimonial contract, unattended by any religious ceremony, was (before the marriage act 26 G. 2, c. 33), equivalent to a marriage legally solemnized, is ably controverted by Mr. Jacob, in a very learned note to the 2d edit. of *Roper's Law of Property* arising

would have been sufficient to prove this marriage by circumstantial evidence
 *642] without showing the actual performance of any *religious ceremony; and
 that, at all events, the burden of proving the nullity of marriage rests
 with the party who insists on it; and such a marriage in Ireland is valid though
 it be performed in a private house, *Smith v. Maxwell*, 1 Ry. & M. 80. But,
 assuming that it was necessary in this case to prove that the marriage was cele-
 brated by a clergyman, there was sufficient evidence of that fact, for the letters
 of orders being thirty years old, were admissible without any proof of the hand-
 writing or seal of the archbishop, according to the general rule, that ancient
 deeds, receipts, letters, and other writings, are admissible in evidence without
 proof of execution, provided they come from a proper custody. Here the docu-
 ment was found amongst Wood's papers. But *Rex v. Cliviger*, 2 T. R. 263,
 will be relied upon, to show that the wife was not a competent witness to prove
 the former marriage, more especially after the husband had been called to prove
 the second marriage, on the ground that the husband and wife ought not to be
 permitted to give any evidence that may tend to criminate each other. That
 case, however, was very much considered in *Rex v. The Inhabitants of All Saints,*
Worcester, 6 M. & S. 194; and there the Court were of opinion, that the rule
 so laid down was too large and general, that the first wife would have been com-
 petent to prove her marriage, though the second marriage had been first proved;
 for her evidence did not directly criminate the husband, and never could be used
 against him, nor could he be affected by the judgment of the Court founded
 upon such evidence; and Abbott, C. J., said, that he understood the expression
 *643] that the wife's testimony was not admissible to criminate *the husband,
 as limited to the case where such testimony was to charge the husband in
 the course of some proceeding in which a crime was imputed to him.

Royers, contrd. It may be admitted that a marriage in Ireland, not being
 regulated by any of the English marriage acts, need not be in *facie ecclesiae*, and
 that if it was celebrated by a clergyman of the established church, the circum-
 stance of the wife being a catholic and the husband a protestant does not invali-
 date the marriage within the Irish acts 9 G. 2, c. 11, and 19 G. 2, c. 13. Therefore,
 the only question as to the validity of the marriage is, whether or not there was
 any evidence of Wood being a priest. The reputation in this case cannot be
 relied on, and unless the Court are satisfied that the letters of orders were pro-
 perly received in evidence, there is no legal ground for assuming that Wood was
 a clergyman. Now, in all cases, where the seal of a corporate body is attached
 to any instrument offered in evidence, which instrument derives its legal effect
 from such seal, it is necessary that it be proved in fact that such seal was that
 of the particular corporation, *Moises v. Thornton*, 8 T. R. 303, per Lawrence, J.,
 and there can be no distinction in the proof necessary for the seal of an arch-
 bishop who is a corporation sole, and the seal of a corporation aggregate. The
 same principle is established with regard to the seals of inferior and foreign courts,

from the relation between Husband and Wife; Vol. II., Addenda, No. 1, p. 445; where he
 observes, "The various authorities here adduced, establish the position, that, according to the
 law administered in England before the marriage act, a matrimonial contract *de presenti* was
 essentially distinct from a marriage solemnized by a person in holy orders, (in support of which
 position he cites Fitzh. N. B. 150 N. Foxcroft's case, 4 Vin. Abr. 218, pl. 18, and another case,
 4 Vin. Abr. 38, pl. 21; *Weld v. Chamberlayne*, 2 Show. 300; *Holder v. Dickinson*, 1 Freem. 95;
Paine's case, 1 Sid. 13, and several other cases. Statutes 25 Hen. 8, c. 21, 32 Hen. 8, c. 38, 12
 Car. 2, c. 33, 6 & 7 W. 3, c. 6, s. 63, and 52, 7 & 8 W. 3, c. 35, 57 G. 3, c. 51, 58 G. 3, c. 84: the
 Irish statutes 19 G. 2, c. 13, 11 G. 2, c. 10, s. 3. That it did not confer on the woman the right
 to dower (*Perkins's* 306, s. 194. Lord Hale's notes to Co. Litt. 33 a, note 10), or on the man the
 right to the woman's property (*Swinburne*, 215, 234, 235; *Ayliffe's Parergon*, 245, and *Bacon's*
Abr. tit. Marriage (C), *Haydon v. Gould*, 1 Salk. 119;) or on the issue the rights of legitimacy,
 (*Bunting v. Lepingwel*, Moor, 169, 4 Co. 29, *Godolphin's Repertorium Canonicum*, chap. xxv., pl.
 2 and 6;) and that it did not render a subsequent marriage with a third person *ipso facto* void at law,
 though it formed a ground for a sentence annulling it. They seemed also to show that, accord-
 ing to the ecclesiastical law, the contract did not give any right, except to call for a performance
 of it by actual solemnization, not justifying cohabitation, and not conferring conjugal rights; and
 that at the common law it had no effect, though in cases where the parties cohabited, and were
 reputed to be man and wife, this might be sufficient evidence for the purposes of some actions,
 in which strict proof was not required."

Chadwick v. Bunning, 1 Ry. & M. 306, Henry v. Adey, 3 East, 221. Then does the circumstance of the letters of orders being more than thirty *years old alter the case? The reason of that rule applies only where it is necessary to produce the witness who actually saw the seal of an individual affixed to an instrument, or to account for his non-production; and it has been considered reasonable, that after the lapse of thirty years, parties should not be called on to produce, or to account for, the chance witnesses who may happen to be called in to attest a deed; but as a corporate seal is always the same, no difficulty is imposed on parties to call a witness to show that the impression is of the seal of the corporation now in use. If, indeed, it had been shown that any change of the seal had taken place, it might be unreasonable to call on parties to identify a seal as the one used by a corporation at any particular time. But at all events Mary Byrne was, in this case, incompetent to prove the first marriage, because, in so doing, she both criminated and contradicted her husband; and this case is distinguishable from that of Rex v. All Saints, Worcester, 6 M. & S. 194. There the husband was not called; therefore, there was no contradiction, and at the time the wife was called, nothing that she said even tended to criminate him, for no evidence of a subsequent marriage had been given. In Rex v. All Saints, Worcester, Lord Ellenborough, C. J., and Abbott, J., advert to this distinction. That case, therefore, stands clear of both the objections now made, and then the case of Rex v. Cliviger is a binding authority as to both, the circumstances of the two cases being precisely the same. The principle upon which husband and wife are incompetent to give evidence *against each other, is stated by Lord Coke to be quia duse sunt animæ in unâ carne, and it might produce implacable discord and dissension, and be a means of great inconvenience, Co. Litt. 6 b. The same principle is stated in Hawkins's Pleas of the Crown, b. 2, c. 46, §. 67, and by Mr. Justice Grose in Rex v. Cliviger. Now, if this be the true principle, it seems immaterial whether the husband is, or is not, a party directly to the proceeding; for though, indeed, if he be not, the evidence may not legally criminate him, yet it does so morally, which would produce as much discord and dissension as if it were given for the purpose of convicting him of a crime with which he might happen to be charged. In the case of Davis v. Dinwoodie, 4 T. R. 678, which was an action against the sheriff for taking the goods belonging to a feme covert under a marriage settlement, the husband was called to prove that the goods were not his, and therefore to make himself liable in another action; but the Court held him incompetent, though his wife was no party to the record; and Lord Kenyon said that, independently of the objection of interest, husbands and wives are not admitted for or against each other.

Curr. adv. vult.

Lord TENTERDEN, C. J., now delivered the judgment of the Court.

First, we are of opinion that the witness Mary, assuming her to be the first and lawful wife of W. T. Cooke, was a competent witness.

The question arose on the settlement of another *woman, considered to be the wife of Cook. Cook was examined, and proved his marriage with this woman; but he was not asked, and did not say, that he had not been previously married to the witness Mary. The witness, Mary, was afterwards called to prove her previous marriage with this person. In deposing to this marriage, she did not contradict anything that he had said. I notice this fact; but we do not mean to say that, if she had been called to contradict what he had sworn, she would not, in a case like this, have been a competent witness to do so. It is not necessary to decide that question at present; but it may well be doubted whether the competency of a witness can depend upon the marshalling of the evidence, or the particular stage of the cause at which the witness may be called. In the present case, however, the witness not having been called to contradict her husband, and her testimony not being inconsistent with the fact to which he had deposed, her incompetence, if it can be established, can be so only upon the authority of the case of The King v. The Inhabitants of Cliviger, 2 T. R. 265. The authority of that case was much shaken by the decision of the case in The

King v. The Inhabitants of All Saints, Worcester, 6 M. & S. 194, in which Lord Ellenborough said, "The objection rests only on the language of The King v. Cliviger, that it may tend to criminate him; for it has not an immediate tendency, inasmuch as what she stated could not be used in evidence against him. The passage from Lord Hale (P. C. 301) has been pressed upon us, where it is said the wife is not bound to give evidence against another in a case *647] of theft, if her husband be *concerned, though her evidence be material against another, and not directly against her husband. Admitting the authority of that passage, it assumes that the husband was under the criminal charge; that he was included in the *simul cum aliis*. But if we were to determine, without regard to the form of proceeding whether the husband was implicated in it or not, that the wife is an incompetent witness as to every fact which may possibly have a tendency to criminate her husband, or which, connected with other facts, may perhaps go to form a link in a complicated chain of evidence against him, such a decision, as I think, would go beyond all bounds; and there is not any authority to sustain it; unless, indeed, what has been laid down, as it seems to me, somewhat too largely, in Rex v. Cliviger may be supposed to do so."

The decision in the case of Rex v. The Inhabitants of Cliviger appears to have been founded on a supposed legal maxim of policy, viz. that a wife cannot be a witness to give testimony in any degree to criminate her husband. This will undoubtedly be true in the case of direct charge and proceeding against him for any offence; but in such a case she cannot be a witness to prove his innocence of the charge. The present case is not a direct charge or proceeding against the husband. It is true, that if the testimony given by both be considered as true, the husband, Cook, has been guilty of the crime of bigamy; but nothing that was said by the wife in this case, nor any decision of the court of session, founded upon her testimony, can hereafter be received in evidence to support an indictment against him for that crime. This is altogether *res inter alios acta*; neither *648] the husband nor the wife has any interest in the *decision of the question, and the interest of the parish of Pancras required that the illegality of the second marriage should be established, if it was in fact illegal.

Secondly, We are also of opinion that the certificate of the ordination of Mr. Wood, by whom the first marriage was celebrated in Ireland, was properly received in evidence. This certificate came from the proper custody. It was produced by the widow of Wood, and was found among his papers at his death. It was dated in 1799, more than thirty years before the time of its production in evidence; and if it had been signed only, there could have been no question as to its admissibility; but, in fact, it was also sealed: and it was contended that this must be considered as the seal of a court or of a corporation, and therefore not within the rule as to thirty years, but requiring to be proved. It is not necessary to decide whether such a seal be within the rule; it may be argued that it is not within the principle of the rule, because, although the witnesses to a private deed, or persons acquainted with a private seal, may be supposed to be dead, or not capable of being accounted for after such a lapse of time, yet the seals of courts and corporations, being of a permanent character, may be proved by persons at any distance of time from the date of the instrument to which they are affixed. We think it not necessary to decide this question, because a certificate of ordination is not the act of any court; and although an archbishop is a corporation sole for many purposes, such as those relating to the temporalities of his see, yet such a certificate has no relation to his corporate character, and the seal must be considered as the seal of the natural person, and not of the corporation.

*649] *The result of this is, that the decision of the sessions was right, and the rule must be discharged. Order of sessions confirmed.

WINTER v. HALDIMAND.

A policy of insurance was effected at and from the river Plate to Canton and back, on specie, &c., shipped in the river Plate, and on the returns thereof, in any description of merchandise, with liberty to declare and value thereafter. The assured chartered a vessel on a voyage from Buenos Ayres, to Canton and back, and they were to pay for the voyage 10,000 dollars in manner following: viz. "In China, all the sums that might be necessary for the payment of the port charges and other incidental expenses, the latter not exceeding 2000 dollars, and the balance at thirty days after the vessel's return to Buenos Ayres." The underwriters had no notice of the terms of the charter-party. The assured shipped on board this vessel at Buenos Ayres a quantity of specie, consigned to an agent at Canton, who, on the ship's arrival there, advanced to the captain a sum of money, being the amount of the port charges, and a further sum for incidental expenses; and he shipped other goods on board the vessel, on account of his principals, for the homeward voyage. No valuation was ever made in pursuance of the liberty reserved by the policy.

The vessel on her return voyage was lost:

Held, that the assured were not entitled to recover the two sums paid by their agent at Canton, for port charges and other incidental expenses, as part of the value of the merchandise shipped at Canton, and insured by the policy, inasmuch as the money agreed to be paid there was not properly freight, and had no distinct relation to the goods shipped.

Quære, Whether, upon an open policy, a payment made on the shipment of goods, can, in the event of loss, be added to their price, so as to form part of their value.

THIS case was referred to an arbitrator, who by his award stated the following facts for the opinion of the Court:—

The plaintiff is a British merchant residing in London, and is the agent of Don Pedro de Lezica and Don Miguel de Reglas, who at the time of the transactions out of which the cause arose, were merchants residing at and subjects of the state of Buenos Ayres in South America. The plaintiff was authorized by them to effect, and did, in October 1825 effect in his own name at Lloyd's Coffee House in the city of London, a policy of insurance (in the common form) at and from the river Plate to Canton, during the vessel's stay and trade there, and back to any port or ports, place or places of *discharge in the river Plate, on specie, &c., shipped in the Leonidas in the river Plate, and on the [650] same or the returns thereof (as interest might appear) in any description of merchandise, with liberty to declare and value thereafter. The defendant was one of the underwriters. D. P. de Lezica and D. M. de Reglas had, in June 1825, chartered the Leonidas for a voyage from Buenos Ayres to Whampoa, and back to Buenos Ayres. It was stipulated that the vessel should not carry any cargo, passengers, or letters, on either of the two voyages, without the approbation of the freighters; and the latter agreed to pay for the voyage 10,000 dollars, in manner following; viz. in China all the sums that might be necessary for the payment of port charges and other incidental expenses (the latter not exceeding 2000 dollars), and the balance at thirty days after the vessel's return to the port of Buenos Ayres. Buenos Ayres is a port in the river Plate; and Whampoa mentioned in the charter-party is the same place as Canton mentioned in the policy of assurance.

D. P. de Lezica and D. M. de Reglas, having so chartered the Leonidas, shipped on board her at Buenos Ayres 48,000 Spanish dollars; and consigned the same to their agent at Canton, for the purpose of being invested in produce, to be returned to them at Buenos Ayres. The ship sailed for and arrived at Canton, and the dollars were delivered to the agent, who paid Bartlett (the captain) 3154 dollars 60 cents, being the amount of the necessary port charges of the Leonidas, paid by Bartlett at Canton, and the further sum of 2000 dollars for other incidental and necessary expenses. The agent also shipped on board the said vessel 1567 chests of tea for D. P. de Lezica and D. M. de Reglas, and *consigned the same to them at Buenos Ayres. The money paid for the [651] tea, with the expenses of shipping, amounted to 42,845 dollars and 40 cents. The Leonidas sailed from Canton on her return to Buenos Ayres with the chests of tea on board; and in the course of that voyage was captured by a ship belonging to the Emperor of Brazil (who was then at war with the state of Buenos Ayres), and carried into Rio de Janeiro, a port belonging to the Empe-

ror. By this capture, and by the result of proceedings afterwards taken in the competent courts at Rio Janeiro, the cargo of teas became wholly lost to Don P. de Lexica and Don M. de Reglas. No declaration or valuation was ever made upon the policy of assurance by or on behalf of the plaintiff, or of Don P. de Lexica and Don M. de Reglas.

Before the commencement of this action the defendant paid the plaintiff 262*l.* 0*s.* 5*d.* in respect of his subscription of 300*l.* to the policy of assurance (being at the rate of 87*l.* 6*s.* 9*d.* per cent. upon such subscription), without prejudice to the plaintiff's further right to recover in respect of the two sums paid to the captain at Canton; the payment so made by the defendant to the plaintiff, being the defendant's proportion of the costs and charges upon all the teas shipped from Canton as aforesaid, independent of what had been there paid to the captain.

By the usage of Lloyd's in matters of insurance, where liberty is given by the policy to declare and value after the insurance is effected, and no declaration or valuation is endorsed on the policy, it is considered as an open policy.

Neither the defendant nor any of the other underwriters had any notice or *652] knowledge of the charter-party *above stated until after the capture had taken place and they were called upon to pay the loss.

The arbitrator awarded that, if the Court should be of opinion that by law the plaintiff was entitled to recover in respect of the 8154 dollars and 60 cents, and the 2000 dollars paid at Canton to the captain, then the plaintiff was entitled to claim from the underwriters to the policy the full amount of their respective subscriptions, and to recover from the defendant in this action, 37*l.* 19*s.* 9*d.*: but if the Court should not be of that opinion, then the sum already paid by the defendant was the full amount of his liability, and the plaintiff was not entitled to recover. And upon the whole matter he awarded that the plaintiff was not entitled to recover, and that the defendant should have judgment.

A rule nisi having been obtained for setting aside the award, and entering judgment for the plaintiff for the sum of 37*l.* 19*s.* 9*d.*, the Court directed a special case to be stated. The case was argued on a former day in this term by

Sir *James Scarlett* for the plaintiff. The assured are entitled to recover the two sums paid for port charges and other incidental expenses at Canton, as part of the value of the goods there shipped and insured by this policy. It will be said that those sums cannot be recovered; because it is a rule that in an open policy on goods, in case of a loss, the party can recover only the invoice price, and all duties and expenses incurred till they are put on board, together with the premium of insurance. But the principle and foundation of all insurance is indemnity. The object of the contract is to divide among many the loss which *653] would otherwise fall *upon one. The party insured, ought, therefore, to have a complete indemnity, though no profit. Valued policies are sanctioned merely to prevent litigation as to what is the real indemnity. From the principle that a full indemnity, and nothing more, is to be given, results the rule, invariably adopted in case of an open policy, to estimate a total loss, not by any supposed price which the goods might have been deemed worth at the time of the loss, or for which they might have been sold had they reached the market for which they were destined, but according to the prime cost, viz. the invoice price and all expenses incurred until they are put on board. The premium of insurance is allowed to be charged against underwriters in such a case, on the ground that a party being about to send goods on a mercantile adventure is entitled to secure himself a full indemnity against any loss that may happen; and that he would not do, unless to the other charges he were allowed to add the cost of insurance, which are the costs of procuring that indemnity. Now, here the plaintiff will not be fully indemnified for the loss of the merchandise which was shipped at Canton, unless he recovers from the underwriters, besides the prime cost and shipping charges, the port charges and other incidental expenses paid at Canton. It must be assumed that the assured could not have hired this ship without engaging to pay certain sums at Canton; and those sums, if the ship had been lost on the voyage from Canton to Buenos Ayres, could not have been reco-

vered back from the ship-owner. Then, to give the assured a full indemnity, they must be allowed to insure those sums. [Lord TENTERDEN, C. J. They might have insured them as money paid for shipment of goods to be transported to Buenos Ayres; but they have *merely effected a policy on merchandise.] [*654] Those sums constitute part of the value of the goods shipped at Canton. It is not unusual, on shipments of goods in London, that part of the freight, should be paid here in advance, and when it is so paid, it is considered in practice as part of the value of the goods. In Stephens on Average, p. 53, it is said, that "when the average is adjusted at the port of loading, and the freight has been paid there, the practice is to add it to the value of the cargo, in the same manner as any other charge incurred on the goods before putting them on board the ship: for the merchant has then an interest in the freight, by its being converted into a charge on his goods." The value of the goods is the amount of all the costs of producing them, whether those costs be calculated in labour or money. If an insurance were effected on so many tons of oil (obtained by labour only) in the whale fishery, in case of loss the value must be measured by the value of that quantity of labour which on an average is requisite to obtain such a quantity of oil. So, if the insurance be on goods purchased, the value must be ascertained by adding to the prime cost the shipping charges, premiums of insurance, and such freight as was necessarily payable in order to give the assured an opportunity of shipping the goods on the voyage insured; for if, without first paying that freight, he could not ship the goods, the freight then becomes part of their value.

Maule, contra. By the contract of affreightment, the charterers were to pay for the use of the ship a given sum of money; of which one portion was to be payable on the contingency of the vessel's arriving at Canton, *the other portion on the contingency of her arriving at Buenos Ayres. The charter- [*655] ers were purchasers of the ship for a term; and they would be liable to pay those sums even if they did not load any goods at Canton. The payment of those sums had no relation to the goods. In Usher v. Noble, 12 East, 639, it was held, that the standard of calculation for ascertaining the value of an open policy on goods, either in the case of an average or a total loss, was the invoice price at the loading port, including premium of insurance and commission. The general principle, that an insurance is a contract of indemnity, is not disputed; but there are cases where a perfect and full indemnity cannot be obtained, as where goods insured sustain damage on the voyage, but arrive at the place of destination; the freight will then become payable: and though, perhaps, the value of the goods, by reason of the damage, may not equal the freight, still the assured cannot claim, in addition to the damage done to the goods, any part of the freight which they have so paid; and yet in such a case the assured has not a perfect indemnity. The sums paid at Canton cannot be considered as returns of merchandise. Flint v. Flemyng, 1 B. & Ad. 45, shows that a ship-owner may recover, on a policy on freight, in respect of the benefit he would derive from carrying his own goods in his own ship. If that be so, he cannot recover the value of that benefit on a policy on goods. Suppose the party here had bought the ship, to be paid for at Canton, no part of the price paid for it could have been claimed by the assured as part of the value of the goods. Or, suppose it had been his own ship, and that it had been necessary to repair her in order to bring [*656] *home the cargo; the expense of those repairs would not constitute any part of the value of the goods. Where freight is paid in London on a vessel chartered there on an outward voyage, that freight is not in practice considered part of the value of the goods. *Cur. adv. vult.*

Lord TENTERDEN, C. J., now delivered the judgment of the Court. After stating the facts of the case, his Lordship proceeded as follows:—

In the argument on behalf of the plaintiff, reference was made to the principle and foundation of all insurance, viz.: indemnity; and it was contended that, to effect that object, and bring the case within the principle, the payment at Canton must be considered as part of the value of the goods shipped at that place; and it was observed, that the charges of shipping and the premium of insurance are,

even in open policies, considered as part of the value of the goods; and further, that the freight, also, if paid in advance, was, in practice, considered as part of their value on a total loss. This latter assertion was denied by the defendant's counsel to be true; and the Court has no means of knowing how the practice may really be, nor is the ascertainment of the practice material in our view of the case.

Although indemnity is the principle of insurance, yet the contract of insurance is, like other contracts, subject to explanation and construction, regulated in some countries by positive law, in this country by usage; and it will be found, that absolute and perfect indemnity is not attained in all circumstances and cases, and under every possible event. One instance, and a familiar one, was mentioned *657] by the defendant's counsel: if goods *sustain damage on the voyage, but arrive at the place of destination, the freight may become payable, although, by reason of the damage, the value of the goods may fall short of the amount of freight; but the latter cannot be added to the amount of the damage, and the assured has not a perfect indemnity for his loss.

There can be no doubt that, where the construction of the policy is regulated by the positive law of any country, the indemnity of the assured cannot be extended beyond the limits allowed by the law. In this country, if we should depart from usage and decisions, and, instead of reasoning upon them, should look to abstract principles, we should resolve things into their first elements. Laws and usages vary in different countries on this as on other subjects. In this country many losses are considered as losses by perils of the sea, and recoverable under those words in the policy, which, in France and some other countries, are not recoverable unless the underwriters insure against barratry of the master; and, in some countries, negligence and want of skill are included under the term barratry, which in this country are not so included. See Valin on the Ordonnance de la Marine, liv. iii. tit. 6. Des Assurances, art. 28. In this country, and probably in some others, the premium of insurance is considered as part of the value of the goods, and recoverable as such. In France, the insurance of the premium is allowed by a particular provision of the Ordonnance, ib. art. 20; but this must be effected by some special clause in the policy by which the goods are insured, or the insurance may be by a distinct policy. 2 Valin, p. 67, and 1 Emerigon, c. 8, s. 12, p. 246. I may observe here, that this part of the *658] twentieth article of the Ordonnance, and also the *twenty-eighth article, are retained in the new Code de Commerce, art. 342, 353.

No case like the present has been found in our books; nothing of the like nature was quoted from foreign authors; and, as far as my knowledge of them extends, nothing favourable to the plaintiff can be found in them.

We must therefore look at the terms of the policy, which is the contract in question, and see whether its terms, construed according to any principle recognised by usage in this country, will authorize the plaintiff to charge the defendant with these payments at Canton as part of the value of the merchandise shipped there: there is no other mode in which the defendant can be made answerable for them on this policy; though we have no doubt that those payments might have been made the subject of a special and distinct insurance.

It is found that the underwriters had no notice of the terms of the charter-party, and therefore they could not know whether the parties interested would engage, as they have done, to treat the payments to be made at Canton as part of what is called the freight, so that the loss thereof would fall upon them if the goods were lost; or whether they would only engage to advance money at that place, so as to be entitled to reimbursement from the owners of the ship if the goods were lost; or whether the owners of the ship would be to find the means of making those payments on their own account. And it appears to us to be unreasonable to make the extent of the responsibility of the underwriters depend on the terms of a private contract made by the parties interested, and not upon *659] the general usage and customs of trade.

*The sum of 10,000 dollars is not properly to be called freight, but

is the price of the hire of the ship, and would have been payable if the whole 48,000 dollars had been left or otherwise disposed of at Canton, and the ship had returned in ballast, or with passengers instead of merchandise. And if these payments to the amount of 5154 dollars can be added to the price of the goods shipped in this case, it will be difficult to say that they might not have been added to the price of a much less quantity, or a much less valuable cargo.

In truth, the sums payable to the owners of the ship, or for the use of the ship, have under this charter-party no distinct relation to the goods.

We are, therefore, of opinion that the payments in question cannot, in this particular case, be added to and considered as part of the price of the goods.

Our opinion on this case will have no effect on the question, whether the payment on the shipment of goods can be added to their price, so as to form part of their value in an open policy, if ever that question should arise. Such a payment is not properly freight, but the price of the privilege of putting the goods on board the ship, in order to have the opportunity of their being conveyed to the place of her destination; it relates specially and distinctly to the goods: and where it is constantly made, according to the usage of trade, from and to any particular country, the usage may be supposed to be known to the underwriters, and may be (but we do not say that it will be, or ought to be,) considered as a part of the shipping charges, or at least as so closely analogous thereto as to be governed by the rule that is applicable to those charges, in the construction of the policy.

*The consequence of our opinion is, that the rule for setting aside the award and entering a verdict for the plaintiff must be discharged. [*660]

Rule discharged.

GEORGE CLARKE v. THOMAS PERCIVAL. June 6.

A. having given his daughter on her marriage the stock of a public-house, amounting in value to 1200*l.*, she and her husband signed the following instrument: "On demand, we promise to pay to A. or his order 1200*l.* for value received in stock, &c., this being intended to stand against me, M. (the daughter) as a set-off for that sum left me in my father's will above my sister Ann's share."

Held, that this was not a promissory note.

THIS was an action on the following instrument, declared on as a promissory note:—

"Warrington, 4th of March, 1824.

"£1200 0 0.

"On demand we promise to pay to Mr. George Clarke, or his order, twelve hundred pounds for value received in stock of ale, brewing vessels, &c.; this being intended to stand against me, the undersigned Mary Percival, as a set-off for that sum left me in my father's will above my sister Ann's share.

"THOMAS PERCIVAL.
MARY PERCIVAL."

"Witness, William Hall.

Plea, the general issue. At the trial before Bayley, J., at the Lancaster Summer assizes 1830, Hall, the subscribing witness to the instrument, being called to prove the execution of it, on his cross-examination stated that the plaintiff had two daughters, Ann and Mary, and before the marriage of the latter with the defendant, had already given to Ann 1200*l.*, and had therefore left Mary by his will a sum exceeding by 1200*l.* that left to Ann. On the marriage of Mary with the defendant, the plaintiff gave up to them the stock of a public-house and brewing utensils, amounting in value to 1200*l.*, as a marriage portion; and after the marriage *he stated to the defendant and his wife the fact of his having left her 1200*l.* more than he had to his daughter Ann; and proposed that, instead of his altering his will, the defendant and his wife should [*661]

sign a note containing an acknowledgment that that sum had been received by them. To this they assented, and the instrument in question was accordingly given. It was contended that this was not a promissory note within the statute 3 & 4 Ann. c. 9; the object of it being not to give the plaintiff any right of action, but that his executors, in the event of the defendant and his wife claiming 1200*l.* under the will, might use the note as an admission, on her part, that the property mentioned in it was given to her in lieu of the sum claimed: and in that case, it was urged, the instrument operated merely as an agreement. The learned Judge directed the jury to find a verdict for the plaintiff, but reserved liberty to the defendant to move to enter a nonsuit. A rule nisi having been obtained for that purpose,

F. Pollock and *Wightman* now showed cause. It must be conceded that, in order to make an instrument operate as a promissory note within the statute of Anne, it must purport that the money shall be payable absolutely and at all events, and not out of a particular fund, if that fund be uncertain. Here the money is made payable on demand, and not out of any particular fund. The intention of the defendant and his wife was to make it appear that they would not take the 1200*l.* bequeathed to her in the will. [LITTLEDALE, J. An instrument in the form of a note, but with a memorandum written upon it stating that it is taken for securing the payment of all such balances as shall be due from one of the makers to the payee, to the extent of the sum mentioned *662] *therein, *Leeds v. Lancashire*, 2 Campb. N. P. C. 205, or that if any dispute shall arise respecting the subject which is the consideration for it, it shall be void, *Hartley v. Wilkinson*, 4 Campb. 127, 4 M. & S. 25, is not a promissory note within the statute. The instrument in this case is of a similar description. [Lord TENTERDEN, C. J. The intention was, if Mary Percival claimed 1200*l.* under her father's will, the note was to be used by the executors as a set-off against that claim.] It was possible that the state of things contemplated by the parties to the note did not exist. If it did not, the 1200*l.* would be payable at all events. Clarke, whose will is referred to, was alive, and was the very party to whom the note was made payable. [PARKE, J. The note must speak for itself; and it is not averred, in the count on the note, that the plaintiff was the father of Mary Percival.]

Lord TENTERDEN, C. J. That being so, all that we can collect upon the face of the declaration is, that the note was intended to be a set-off against some claim. It is, undoubtedly, not a note payable at all events.

LITTLEDALE, J. The note would not be evidence to support a count for goods sold, or on an account stated. On the face of it, it is clear that it is not payable at all events.

PARKE, J. This note was not intended as a promise to pay the sum mentioned in it to Clarke or to his executors, but was only a memorandum of such a sum having been received as a satisfaction pro tanto of the intended legacy.

*663] *TAUNTON, J. This was a bungling transaction. The note was not intended to confer on the father a right of action, but to give to his executors an opportunity of setting off the sum of 1200*l.*, if that amount should be claimed on behalf of Mary. It clearly, therefore, was not a note payable at all events. The rule for entering a nonsuit must be made absolute.

Rule absolute.

COLLIER, Gent. One, &c., v. Sir WILLIAM HICKS, Bart., ROBERT CAPPER, Esq., G. RUSSELL, and E. CASTLE. June 7.

Trespass for assaulting, and turning plaintiff out of a police-office. Plea, that two of the defendants, being justices of the peace, were assembled in a police office to adjudicate upon an information against A. B. for an offence against a penal statute, and were proceeding to hear and determine the same, when the plaintiff (being an attorney) entered the police office with the informer, not as his friend or as a spectator, but for the avowed purpose of acting as his attorney and advocate touching the information; and as such attorney and advocate, without the leave, and against the will, of the justices, was taking notes of the evidence of a witness then under examination before them, touching the matter of the said information, and was acting and taking a part in the proceedings as an attorney or advocate on behalf of the informer; that the above two defendants stated to the plaintiff, that it was not their practice to suffer any person to appear and take part in any proceedings before them as an attorney or advocate, and requested him to desist from so doing; and although they were willing to permit the plaintiff to remain in the police office as one of the public, yet that he would not desist from taking a part in the proceedings as such attorney or advocate, but asserted his right to be present, and to take such part, and to act as such attorney and advocate for the informer; and unlawfully, and against the will of the justices, continued in the police-office, taking part and acting as aforesaid, in contempt of the justices; whereupon, by order of the above two defendants, the other defendants turned the plaintiff out of the office:

Held, on demurrer, that this was a good plea, inasmuch as no person has by law a right to act as an advocate on the trial of an information before justices of the peace, without their permission.

TRESPASS for assaulting the plaintiff, and turning him out of a police-office at Cheltenham, in the county of Gloucester. Plea, that on the 3d of December, 1829, to wit, at, &c., one William Latham appeared before and informed J. C. Esq., one of his majesty's justices of the peace for the county of Gloucester, that one J. Richings did on the 7th of September *then last past drive a certain carriage or vehicle, with passengers to be conveyed for hire at separate fares upon a public highway, not having thereon a plate or plates as directed by 7 G. 4, c. 33, contrary to the statute in that case made and provided, which imposed a penalty of 20*l.* for the said offence; and that the said J. C., duly issued his summons for the appearance of the said J. Richings, on Tuesday the 8th of December then instant, to answer the said complaint and information; that the summons was served upon the said J. Richings, and that the defendants Sir W. Hicks, Bart. and R. Capper, Esq., two of the justices assigned to keep the peace for the said county of Gloucester, at the said time when, &c., to wit, on the said 8th of December, were duly assembled in the said police office in the declaration mentioned, together with certain other justices, to hear and adjudicate upon the said information and complaint; that the said J. Richings on that occasion appeared before the defendants Hicks and Capper, and the other justices; and the defendants Hicks and Capper, and the other justices, as such justices, &c., were proceeding to hear and determine the said information and complaint, and to examine witnesses touching the premises, &c.; and that the plaintiff, being an attorney, entered the police office with W. Latham the informer, not as a spectator or as the friend of Latham, but for the express and avowed purpose of acting as the attorney and advocate of Latham touching the said information and complaint, for fees or reward to him the plaintiff in that behalf; and the plaintiff, as such attorney and advocate, without the leave or licence, and against the will of the defendants Hicks and Capper, and the other justices, was taking notes of the evidence *of one W. D., then under examination before them, touching the matter of the said information and complaint, and was acting and taking part in the proceedings in the said police-office touching the said information and complaint, and in the said examination, as attorney or advocate for the informer; that the defendants Hicks and Capper stated to the plaintiff, that it was not their practice to suffer any person to appear and take part in any proceedings before them, as such justices as aforesaid, in the character of an attorney and advocate, and requested and ordered the plaintiff to desist from acting and taking a part in the said proceedings as such attorney or advocate for Latham; and that although they, the defendants, Hicks and Capper, and the other justices, were willing to permit the plaintiff to remain and be present in the police-office as one

of the public, yet the plaintiff did not, nor would, on being so requested, desist from acting and taking part in the said proceedings as such attorney or advocate, but absolutely refused so to do, and maintained and asserted his right to be present in the police-office, and to take a part in the said proceedings, and to act as such attorney and advocate for and on the part and behalf of Latham the informer, and unlawfully and against the will of the defendants, Hicks and Capper, and the other justices, continued in the police-office acting and taking part in the said proceedings, as such attorney and advocate as aforesaid, in contempt, &c., of the said defendants and of the other last-mentioned justices, and to the disturbance and violation of due order and decency in the administration of justice, and to the hindrance thereof, whereupon the defendants, Hicks and Capper, ordered the other defendants, Russell and Castle, being high constables of *666] Cheltenham, to turn the plaintiff out of the police-office, and they, in pursuance of such order, did expel him therefrom into the public street, as they lawfully might. To this plea there was a general demurrer.(a)

Godson in support of the demurrer. The question raised in this case is, whether justices of the peace, sitting in a judicial capacity to determine whether an offence has been committed against a penal statute which authorizes them to summon the party accused, and witnesses, and to examine into the matter of fact, and to give judgment or sentence for the penalty, subject to an appeal to the quarter sessions, are bound by law to permit an attorney or advocate to be present to assist the informer. In *Rex v. Borron*, 3 B. & A. 432, it was held, that an attorney has no right to comment on evidence, or to be present, during the investigation of a charge of felony before a magistrate; and in *Cox v. Coleridge*, 1 B. & C. 37, that the prisoner examined before magistrates on such a charge is not entitled, as of right, to have a person skilled in the law present as an advocate in his behalf, it being a preliminary investigation only, and not conclusive. Those cases do not apply to the present, because this is not the case of a preliminary inquiry, but a trial. *Daubney v. Cooper*, 10 B. & C. 237, shows that the proceeding against a party in a summary manner to recover a penalty given by statute is of a judicial nature, and that the justices before whom such proceeding takes place constitute a court, at which all persons have a *prima facie* *667] right to be present. [Lord TENTERDEN, C. J. That case did not decide that the party had a right to be present in his character of an attorney, but merely as one of the public. PARKE, J. In the present case the party himself was before the justices; the plaintiff did not appear, properly speaking, in the character of an attorney, but of an advocate.] The authorities show that, as the magistrates were exercising a judicial authority, and determining whether an offence had been committed against a penal statute, they constituted an open court, at which all persons had a right to be present. If the plaintiff, therefore, had a right to be present as one of the public, he surely might take notes of the proceedings with a view to an appeal, if that should afterwards become necessary. It was observed by the Lord Chief Justice, in *Cox v. Coleridge*, 1 B. & C. 37, that if the accused might have the assistance of an advocate, the same right could not be denied to the accuser. Now there is certainly no authority to show that a party on trial for an offence before justices of peace is entitled, as of right, to have the assistance of a professional man to act as an advocate; but in point of practice, it is generally allowed in such proceedings. In the superior courts, where Judges of great legal knowledge preside, an advocate is always allowed to plead, and the right to do so, indeed, can hardly be disputed; and if so, *a fortiori*, the right must equally exist in proceedings before justices of the peace, who, from their want of professional knowledge, cannot be so well able to form a correct judgment on the law or the facts of the *668] cases brought before them. If the *privilege can be disputed on the hearing of an information before justices, when they constitute an open

(a) There was another plea, stating the matter of justification somewhat differently; but the plea above stated involves all the points upon which the decision turned.

court, it would be hard to say how far the right might not also be questioned in other open courts, even the superior ones.

LORD TENTERDEN, C. J. The question raised in this case is not whether any person has a right to be present on the trial of an information before a magistrate as long as he conducts himself with decency and propriety, nor whether any one, whether attorney or counsel, or of any other description of persons, may or may not be present and take notes, and quietly give advice to either party: but the question is, whether any one is entitled, without permission of the magistrates, and as a matter of right, to attend and take part in the proceedings as an advocate, by expounding the law, and examining the witnesses. This was undoubtedly an open court, and the public had a right to be present, as in other courts; but whether any persons, and *who* shall be allowed to take part in the proceedings, must depend on the discretion of the magistrates; who, like other Judges, must have the power to regulate the proceedings of their own courts. The superior courts do not allow every person to interfere in their proceedings as an advocate, but confine that privilege to gentlemen admitted to the bar by the members of one of the inns of court. They do not allow attorneys to act as advocates; and in one of them (the Court of Common Pleas), even all gentlemen of the bar are not allowed to exercise *all* the duties of advocates; but the full privilege of so doing is confined to those who **are* of the degree of the coif. So doctors of the civil law are not entitled to act as advocates in the courts at Westminster, although they may do [*669] so by special permission of those Courts. So at the quarter sessions, the justices usually require that gentlemen of the bar only should appear as advocates; but, in remote places, where they do not attend, members of the other branch of the profession are permitted to act as advocates. Persons not in the legal profession are not allowed to practise as advocates in any of these courts. On the hearing of an information, the magistrates, having the discretionary power to regulate the proceedings of their own courts, may decide who shall appear as advocates, and whether, when the parties are before them, they will hear any one but them. It may be, and is, in some cases, very convenient that magistrates should hear counsel or attorneys as advocates, and allow them, as they frequently do, to expound the law, examine witnesses, and reason on the facts; but it has never been decided that any one can claim, as a right, to act in that capacity, without the consent, and against the will of the magistrates. Any person, whether he be a professional man or not, may attend as a friend of either party, may take notes, may quietly make suggestions, and give advice; but no one can demand to take part in the proceedings as an advocate, contrary to the regulations of the court as settled by the discretion of the justices. It may be said, that a denial of this right in proceedings before magistrates, will be a hardship on the parties. I cannot accede to that opinion; on the contrary, I think it may be for the benefit of the parties that such right should not be admitted. If the informer may, as a matter of right, demand that a professional advocate shall be heard **for* him, though he himself be present, the accused must have the same right. The consequence would be, that the parties would in most cases [*670] be put to a heavy and grievous expense. My own opinion is, that, in general, the ends of justice will be sufficiently well attained in these summary proceedings by hearing only the parties themselves and their evidence, without that nicety of discussion, and subtlety of argument, which are likely to be introduced by persons more accustomed to legal questions. For these reasons, I think that the judgment of the Court must be for the defendant.

LITTLEDALE, J. I am of the same opinion. Every court of justice has the power of regulating its own proceedings. In the superior courts in Westminster Hall, when barristers attend, they only are permitted to act as advocates. Perhaps if they did not attend, attorneys might be heard as advocates. There is a difference even in the superior courts in this respect. In the Common Pleas barristers only of a certain rank and degree are permitted to plead. Here the right claimed is for all persons to attend as advocates. The plaintiff, indeed, is

an attorney of one of the superior courts, but he can derive no right from that character to act as an advocate in a proceeding before a magistrate. It seems to me, as magistrates have a right to regulate their own proceedings, they must, consequently, have authority to decide whether advocates shall or shall not be permitted to plead before them, though in cases of difficulty it may be desirable and advisable that the liberty should be granted. I am therefore of opinion, as to the present case, that the plaintiff had no right to take part in the proceedings, or in the examination of the witness, as *an advocate, without the permission of the magistrates, and, consequently, that the alleged trespass is well justified.

PARKE, J. My opinion in this case is not founded in any degree on that part of the plea wherein it is alleged that the plaintiff was taking notes of the evidence of a witness then under examination, but on the other part, where it is stated that he was acting and interfering in the proceedings and in the examination as an attorney or advocate on behalf of the informer, and that the justices told him it was not their practice to suffer any person so to do, and requested him to desist, but were ready to permit him to remain in the police-office as one of the public; that he asserted his right to be present, and to take a part in the proceedings, and to act as such attorney or advocate on behalf of the informer, and that he did, against the will of the justices, continue in the office acting and taking a part in the proceedings, as such attorney or advocate. I am of opinion that, in point of law, this plea is a good justification. It is undoubtedly so, unless it can be made out that all the king's subjects have a right to attend a court of this description, not merely to act as professional advisers, but to take part in the proceedings in the examination of witnesses, and to act as an advocate usually does. Now, it is impossible to say that *all* the king's subjects have a right to act as professional assistants, in the way in which this plaintiff has claimed to do it, either to the party accusing or accused. All may be present, and either of the parties may have a professional assistant to confer and consult with, but not to interfere in the course of the *proceedings. No person *672] has a right to act as an advocate without the leave of the court, which must of necessity have the power of regulating its own proceedings in all cases where they are not already regulated by ancient usage. In the superior courts, by ancient usage, persons of a particular class are allowed to practise as advocates, and they could not lawfully be prevented; but justices of the peace, who are not bound by such usage, may exercise their discretion whether they will allow any, and what persons, to act as advocates before them. Here, the plaintiff having insisted upon the right to act as advocate, the defendants were justified in committing the alleged trespass.

TAUNTON, J. I am of the same opinion. The decision in this case will not be an authority for saying that a person in a police-office has no right to take notes, but that he has no right to act as an advocate for an informer in a proceeding on a penal statute, without leave of the justices. On such occasions, they have the same discretion which every other court has, to regulate their own proceedings. The judgment of the Court must be for the defendants.

Judgment for the defendants

Justice was to have argued for the defendants.

*MOUNTNEY v. WATTON. June 7.

[*673]

Declaration stated that the defendant intending to cause it to be believed that the plaintiff was guilty of feloniously stealing a horse, published a libel concerning him. The libel, as set out, was headed "Horse-stealer," and then alleged that the plaintiff was taken up on suspicion of having stolen a horse, by a constable who was informed that "such a character" was at a certain public-house; it then went on to state circumstances of suspicion against the plaintiff, and ultimately that, having obtained permission to go out of the constable's sight, he made his escape, but was retaken and confined in gaol for examination. Innuendo, that the plaintiff was guilty of feloniously stealing a horse.

The defendant pleaded the general issue, and then a justification as to all parts of the libel except the word "horse-stealer," setting out in this latter plea the several circumstances related in the libel:

Held, that as the declaration alleged that the libel was intended to convey a charge of felony, and this intent was not denied by the plea, the statement of circumstances of suspicion to excuse part of the libel, was no sufficient justification: although *semble*, that where a libel contains propositions that may be separated from each other, one may be justified apart from the rest.

CASE for libel. The declaration stated that the defendant, contriving to injure the plaintiff, and to cause it to be believed that he had been and was guilty of feloniously stealing a horse, composed and published in a newspaper a libel of and concerning the plaintiff, containing the matter following of and concerning him, viz.:—"Horse-stealer. Charles Mountney, a native of Derby, was taken into custody in this town on Saturday night on suspicion of having stolen a gray horse, the property of Mr. Thomas Adderley of Stone, Shropshire. Information was given to Mr. Bowdler, solicitor, who happened to be constable for the night, that such a character was at the White Horse, Frankwell. Mr B., with Heyward the police officer, went in search of him, and found him asleep in bed. Heyward awoke him, and asked where he left the gray horse? He immediately answered 'Chester;' but on looking round, and observing who put the question, he denied all knowledge of the horse." The libel, as set out in the declaration, went on to state that the plaintiff was afterwards conveyed in custody to a house where he had requested to be lodged; that while there, he was *permitted by the person in whose charge he was to go into a separate room, for the purpose, as he said, of speaking with one of the family; [674] that he escaped, as was supposed, through the window of that room, and that he was afterwards retaken, and confined in gaol for further examination. To this recital of the libel was added the following innuendo:—"Then and there by the said libellous matter intending and meaning that he the said plaintiff had been and was guilty of feloniously stealing a horse."

The defendant pleaded, first, the general issue; and, secondly, as to composing and publishing the supposed libel, "*save and except as to the words 'horse-stealer,' part of the said supposed libel,*" that the gray horse, the property of the said T. A. in the libel named (he the said T. A., then living at S. in Staffordshire), had been supposed to have been feloniously stolen, and that information having been thereupon given to the said W. Bowdler in the supposed libel named, he being a night-constable, &c., that the plaintiff was suspected of having stolen the said horse, and was at a house called the White Horse, situate in a suburb of the said town, to wit, Frankwell, in the libel mentioned; he B. being such constable, and having reasonable cause to suspect that the said horse had been feloniously stolen, and suspecting the plaintiff to have stolen the same, and one J. Heyward in the supposed libel named, being a police officer for the town and liberties of Shrewsbury, including Frankwell, and also suspecting as aforesaid, went in search of the plaintiff at the said White Horse, Frankwell, and there found him asleep in bed. The plea went in the same manner through the whole narrative of the libel, as stated in the declaration, and concluded by *justifying in the usual form, except as in the introductory part of the [675] plea was excepted.

The plaintiff demurred to this last plea, assigning for causes, that it was pleaded to part only of the libel in the declaration mentioned, whereas the libel was one and not divisible; and also that the plea did not allege any facts which

justified the libel as explained by the innuendo in the declaration; and, further, that it contained no answer in fact to the declaration, and that it amounted only to the general issue, &c. Joinder in demurrer.

R. V. Richards in support of the demurrer. There are two questions in this case: First, whether, to a declaration for libel, a justification of part may be pleaded. Secondly, whether, omitting the word "horse-stealer," the declaration in this case, which charges, by innuendo, that the libel conveyed an imputation of felony, be sufficiently answered by a plea setting out mere circumstances of suspicion. As to the first point, *Clarkson v. Lawson*, 6 Bingham 266, 587, will be referred to on the other side; but it might (if necessary) be questioned, whether the judgment in that case was well founded. The matter justified there was not the libel complained of. If the plaintiff had proved no more than the words which the plea professed to answer, he would have been nonsuited; and the argument used by three of the Judges, that the defendant ought to be allowed to show by his plea what would exempt him from part of the damages claimed, appears inconsistent with general rules; the true test of a plea being, not whether it goes to mitigate the damages, but whether it denies, or confesses *676] and avoids the matter charged in the declaration. But at all events that case is distinguishable from the present, for the word "horse-stealer" here is essentially connected with the remaining part of the libel, and gives the sting to the whole. The narrative of the libel, if understood (according to the principle laid down in *Woolnoth v. Meadows*, 5 East, 463, in the sense which ordinary persons would give it, clearly carries on the imputation conveyed in the introductory word. The case is like that of *Lewis v. Clement*, 3 B. & A. 702, where a narrative of proceedings in the insolvent debtors' court was headed "Shameful conduct of an attorney." No attempt was made in that case to give a separate justification of the prefatory words, although that course might as well have been taken there as in this case. Secondly, the words in the body of the libel, taken in their ordinary sense, do import that the plaintiff had been guilty of horse-stealing; and the innuendo fixes that meaning upon them. The plea, then, as to this, does not properly confess and avoid. It confesses publication, but does not avoid by justifying to the full extent of the libel; for it only states grounds of suspicion.

Whateley, contra. *Clarkson v. Lawson*, 6 Bingham 587, is in point, and there is no authority for saying that where an alleged libel is in its nature divisible, one part may not be separately justified. In *Stiles v. Nokes*, 7 East, 493, referred to by Tindal, C. J., in *Clarkson v. Lawson*, it seems to have been the opinion of all the Court, that particular parts of the libel might have been justified, if the parts which the justification was meant to cover had been sufficiently *677] distinguished. Where, indeed, the plea professes to answer the declaration as to every part of the libel set out, it may be considered defective if it fail in justifying any matter in which an imputation is conveyed; as in *Johns v. Gittings*, Cro. Eliz. 239, where the libel charged the plaintiff with stealing cloth and velvet, and the plea, purporting to be a general answer, justified only as to the stealing of velvet. *Lewis v. Clement*, 3 B. & A. 702, referred to on the other side, is also an instance of this kind. But it is otherwise where the plea only professes to excuse one part of the libel; and although such part may be set out in the declaration as connected with other matter, yet, if it be in its nature separable, it may be treated as forming an independent proposition. Thus, in *Lord C. Churchill v. Hunt*, 2 B. & A. 685, the declaration stated that an accident had happened by the collision of two carriages, which took place without any fault in the plaintiff, but that the defendant published a libel of and concerning such accident, imputing it to misconduct in him. The plea in justification stated that the accident mentioned in the supposed libel, was the same with that referred to in the introductory part of the declaration; and it then stated that *the said accident* happened by two carriages coming together, and by the plaintiff's misconduct. The jury, having found for the defendant on the justification, but for the plaintiff as to a part of the libel not justified (relating to a circumstance connected

with the accident), it was contended that the verdict upon the justification was in effect a finding that the defendant had not published a libel concerning the accident mentioned in the declaration, and *that such accident as there mentioned had not, in fact, occurred, it being described in the pleadings [*678 as an accident resulting from a *collision of carriages without default in the plaintiff*. This Court, however, held that the collision, and the absence of fault in the plaintiff, might be considered as two independent propositions, and that the jury, by finding in favour of the justification, had negatived the last and not the first. In the present declaration, the part which complains of a libel imputing felony may be separated from that which merely sets out a narrative alleging circumstances of suspicion; and the latter may be answered by a distinct justification. The body of the paragraph stated in the declaration charges nothing more than that the plaintiff was arrested for horse-stealing, and that certain grounds appeared for suspecting him of that offence. The innuendo goes farther; but if that be too extensive, the defendant ought not to be prejudiced. It is, in fact, too large. [Lord TENTERDEN, C. J. That would be a question for the jury on a trial. The words "such a character" must surely refer to the term "horse-stealer."]

Lord TENTERDEN, C. J. I am of opinion that this plea is not sufficient. The declaration states that the defendant published a libel with intent to cause it to be believed that the plaintiff had been guilty of feloniously stealing a horse. If the words of the alleged libel did not amount to a charge of felony, the defendant, on a trial, would have succeeded upon the general issue, and without any justification. But if the words declared upon do impute an actual felony, as the declaration charges, then a justification merely setting out that the *plaintiff [*679 was, on certain grounds, suspected of stealing, cannot be any answer. I do not, however, mean to lay it down that where an alleged libel is divisible, one part may not be justified separately from the rest, if a proper justification can be made out.

LITTLEDALE, J. The gist of the whole matter imputed by this libel is contained in the word "horse-stealer." The rest is a statement of facts, from which the imputation contained in that word is deduced. And the declaration avers, in the beginning, and in conclusion by way of innuendo, that the intention was to impute felony. The justification only states circumstances which induce suspicion, and is, therefore, no sufficient answer. And these circumstances all tend to the one conclusion, which is contained in the word "horse-stealer." In such a case, I think a defendant cannot excuse parts of a libel as grounded on matter of suspicion, unless he can justify that which is the result of the whole.

PARKE, J. It is unnecessary in this case to give an opinion whether or not a defendant may justify any distinct part of a libel, though I am rather of opinion that he may. But here it is charged in the declaration that the libel imputed felony to the plaintiff; the defendant confesses that by his plea, and only justifies by alleging circumstances of suspicion. Such a plea is no answer.

TAUNTON, J., concurred.

Judgment for the plaintiff.

*680] *DOE dem. MONTAGUE GORE, Esquire, v. WILLIAM GORE LANGTON, Esquire. June 7.

Edward Gore, by his will made in February 1801, devised all his manor, or reputed manor of Barrow Minchin, in the county of Somerset, with the mansion-house called Barrow Court thereunto belonging, and the park, and also all his freehold messuages, lands, tenements, and hereditaments *thereunto belonging*, situate in the parish of Barrow Minchin and Barrow Gurney, to trustees to the use of his eldest son W. G. Langton, for twenty years from the day of the testator's death, and after the determination of that estate, to the use of the first and other sons of the testator's younger son Charles Gore, in tail male; remainder to testator's grandson J. G. Langton, and his sons in tail male: and he directed that the persons so taking these estates in tail male, should assume and use the name of Gore. He then disposed of other parts of his real property situate in various counties, and, among other legacies, he bequeathed to his executors all arrears of rent due from *any tenants of his estates in the parish of Barrow*, to be laid out upon the farms, &c., appurtenant thereto; and he charged his *said estate at Barrow* with certain annuities. He bequeathed the residue of his personal property to his son Charles Gore. It appeared manifestly from the whole of the will, that his intention was to dispose thereby of all his real estate. The testator died in March 1801.

The estate and manor of Barrow had been in the testator's family for several generations. In October 1800 he purchased a farm and premises, which adjoined to and were in some parts intermixed with the Barrow estate, and which were situate in the parish of Barrow Minchin and Barrow Gurney. That parish contained two hamlets, Barrow Minchin and Barrow Gurney.

The manor of Barrow Minchin was a reputed manor, without courts, quit-rents, or freehold tenants. It extended beyond the hamlet of the same name, and comprised lands in the other hamlet. The gamekeeper of the manor of Barrow Minchin had been in the habit of shooting over the lands in question for several years before and after they were purchased by the testator, both in the time of the testator and of the defendant.

The testator, upon the marriage of his eldest son, had settled upon him considerable estates at a distance from Barrow Court. The son acquired also property by his wife, whose name (Langton) he took; and upon his marriage he fixed his residence upon one of the estates so acquired, at a distance from Barrow Court.

On ejectment brought by M. G., son of Charles Gore, the second son of the testator, to recover the farm and premises purchased by the testator in October 1800: Held (on a special case submitted to the Court), first, that the date of the purchase; the situation of the lands in question; the fact of William Gore Langton being eldest son of the testator, and having married a lady of fortune, and taken her surname; and that the ancient seat of the Gore family was at Barrow, the eldest son residing at another place, were admissible in evidence to explain the intention of the testator.

Held, secondly, that as the intention of the testator appeared manifest from the whole of the will (if the words "*thereunto belonging*" had not been in it), that the lands in question should pass as part of his Barrow estate, and as a jury might have inferred from the fact of the gamekeeper of the manor having shot over the lands in question, that they were within the limits and part of the manor, and it was left to the Court to draw such conclusions as a jury might have drawn; the words *thereunto belonging* might be understood to mean, in a popular sense at least, "*situate within the manor*;" and, consequently, that the land in question passed by the will.

EJECTMENT on the demise of Montague Gore, Esq., of Barrow Court in the county of Somerset, as devisee under the will of Edward Gore, Esq., formerly of *the same place, his grandfather, against William Gore Langton, *681] Esq., of Newton Park, in the said county, eldest son and heir at law of the said Edward Gore, for lands in the parish of Barrow Minchin and Barrow Gurney in the said county. At the trial a verdict was taken for the lessor of the plaintiff, subject to the opinion of this Court upon the following case; it being open to the Court, if necessary, to draw such conclusions in point of fact as the jury might have formed, and power being reserved to the defendant to object to such parts of the evidence as he might consider to have been improperly admitted at the trial:—

The will was made on the 3d of February, 1801, and the testator died seised in fee of the premises on the 27th of March in the same year.

The devise under which the lessor of the plaintiff claimed was the first devise in the will, and was as follows:—"I give and devise all that my manor or reputed manor of Barrow Minchin in the county of Somerset, together with the mansion-house called Barrow Court, thereto belonging, and the park, and also all and singular my freehold messuages, lands, tenements, and hereditaments thereunto belonging, situate, lying, and being in the parish of Barrow Minchin and Barrow Gurney in the county of Somerset aforesaid, unto A., B., C., and D., trustees, and their heirs, to the use of my son W. G. Langton and his

assigns during the term of twenty years from the day of my death." (A devise was here added to support contingent remainders.) "And after the determination of the said term of twenty years, to the use of the first, second, third, fourth, fifth, and all and every other the son and sons of the body of my son Charles Gore, lawfully begotten, *severally and successively in remainder, &c., and the several and respective heirs male of the bodies of all [*682 such sons, &c.; the elder and his heirs male being always preferred. In default of such issue, the same property was devised to the use of John Gore Langton, third son of W. G. Langton, for life, and afterwards of his first and other sons in tail male; and failing such issue, to the use of the testator's right heirs. The following clause was added:—"And I do hereby will and direct that the person or persons (except my said son William Gore Langton), who shall from time to time become entitled to the hereditaments and premises hereinbefore devised under or by virtue of any of the limitations aforesaid, shall take and use the surname of Gore only, and the arms of my family, and shall have them duly registered in the college of arms." The testator then devised other estates to the use of his son Charles Gore for life, with remainder to his first and other sons in tail male, and in default of such issue, to the use of John Gore Langton, third son of W. G. Langton for life, and his first and other sons in tail male; and in default of such issue, there was a like devise to another grandson, and ultimately to the testator's right heirs. There was no direction in this part of the will for taking the name of Gore. After several other bequests, which are noticed (as far as it is necessary to advert to them) in the judgment of the Court, the testator added,—“And as concerning the rents, issues, and profits of my manors or reputed manors, messuages, lands, tenements, and hereditaments, with all rights, members, and appurtenances thereunto belonging first hereinbefore devised to the said trustees and their heirs in trust as aforesaid (except those limited in use to W. G. Langton and his assigns for *the [*683 term of twenty years), I do hereby direct that the same rents, issues, and profits shall be laid out and invested by my said trustees at interest in the funds, in trust as to the sum of 4000*l.* for the younger children of my said son Charles Gore, to be equally divided amongst them; and as to all the residue of the said rents, and the interest and dividends of the moneys over and above the 4000*l.*, in trust, that they, my trustees, shall lay out and invest the same in the purchase of an estate in fee-simple, being contiguous to my said manors and estate at Barrow aforesaid, or as near thereto as may be; which said estate so to be purchased I direct shall be conveyed to the same uses, upon the same trusts, and to and for the same intents and purposes as are hereinbefore limited, expressed, and declared of and concerning my said manors, messuages, lands, tenements, and hereditaments at Barrow aforesaid, or as near thereto as the nature of the case and circumstances may admit." The will then proceeded thus:—"And I give and bequeath unto my executors hereinafter named, all arrears of rent which shall be due to me at the time of my death, from any tenant or tenants of my estates in the parish of Barrow aforesaid, upon trust to lay out the same in repairing the farm-houses and buildings appurtenant thereto, and in draining the lands for the best and utmost improvement of the same." He also left two annuities, charged upon his "said estate at Barrow." And he gave all the residue of his *personal* estate, charged and chargeable as was before mentioned, to his son Charles Gore.

The estate and manor of Barrow appeared to have been in the testator's family for several generations. The farm and premises for which this ejectment was brought, *adjoined to and were in some parts intermixed with the ancient Barrow estate, and were situate in the parish of Barrow Minchin [*684 and Barrow Gurney. They were purchased by the testator, and conveyed to him by deeds of lease and release dated 21st and 24th of October, 1800. The manor of Barrow Minchin is a reputed manor, without courts, quit rents, or freehold tenants. There are two hamlets in the parish of Barrow Minchin and Barrow Gurney, one called the hamlet of Barrow Minchin and the other the

hamlet of Barrow Gurney. The limits of the manor of Barrow Minchin extend beyond the hamlet of that name, and comprise lands in the hamlet of Barrow Gurney. Some ancient leases, from among the muniments of the Barrow estate, were set out in the case, but were not taken into consideration by the Court, for the reason assigned in the judgment. The gamekeeper of the manor of Barrow Minchin had, from the year 1780, and while the testator and the defendant respectively were lords of the manor, been in the habit of shooting over the land in question. It was admitted that lands in the hamlet of Barrow Gurney, and which adjoined the farm in question, were in the manor of Barrow Minchin. The testator left no property undisposed of by will, unless the premises in question and the land in Backwell after mentioned were to be so considered. The lessor of the plaintiff, Montague Gore, was the first son of the Rev. Charles Gore (the second son of the testator, mentioned in the devise by the name of Charles Gore), and he at the time of the testator's death was a year old. At the expiration of the term of twenty years created by the testator in favour of the defendant, his eldest son, the defendant gave up to the lessor of the plaintiff *685] all the *lands of which the testator had been seised at Barrow, except the farm in question. The testator had contracted, after the execution of his will, for the purchase of a farm in the parish of Backwell, adjoining Barrow. The conveyance was not executed in his lifetime, but the purchase was completed by his executors. Of this last-mentioned farm, the defendant took, and retained possession.

The testator, upon the marriage of the defendant (some time before the execution of the will), settled upon him considerable estates situate at some distance from Barrow Court; and the defendant at that time acquired other considerable estates, also distant from Barrow Court, the property of his wife, whose name of Langton he took in addition to that of Gore. Upon his marriage he fixed his residence at Newton Park, in the county of Somerset, part of the last-mentioned estates. The defendant, unless entitled to retain possession of the land for which this action was brought, had no property in Barrow, and had not become possessed of any lands as heir at law of his father, except the farm, before mentioned, in Blackwell. The testator, before his death, drained the land in question, and put up some gates; the accounts for the drainage were settled and allowed by the testator's steward, who resided at Barrow Court, and the gates were procured from Barrow Court.

This case was argued in Hilary term, by *Robert Scarlett* for the plaintiff, and in Easter term, (a) by *Follett* for the defendant, and by *Robert Scarlett* in reply. The arguments were in substance as follow:—

*686] *For the plaintiff it was contended, that the farm and premises purchased by, and conveyed to, the testator in October 1800, passed to the lessor of the plaintiff under the words "all that my manor or reputed manor of Barrow Minchin in the county of Somerset, together with the mansion-house called Barrow Court thereto belonging, and the park; and also all and singular my freehold messuages, lands, tenements, and hereditaments *thereunto belonging*, situate, lying, and being in the parish of Barrow Minchin and Barrow Gurney, in the county of Somerset aforesaid." If the words "*thereunto belonging*" had been omitted, there would not have been a doubt that the premises in question, which are situate in the parish of Barrow Minchin and Barrow Gurney, would have passed. The defendant, the heir at law, contends that the farm and premises are not within the manor, and, therefore, that as to that part of his property Edward Gore died intestate. Several constructions may be put on the words *thereunto belonging* in this part of the will. The clause in which they occur consists of two distinct parts. In the first, the words *thereunto belonging* refer to the mansion-house, but in the second branch they refer to the word "hereditaments," which is the last antecedent, and may be considered as passing all hereditaments belonging to the testator's freehold messuages, lands, and tenements. Or, if the words "*thereunto belonging*" in the second branch refer to anything in

(a) Before Lord TENTERDEN, C. J., LITTLEDALE, PARKE, and PATTERSON, J.

the first, they may be construed as referring to all the antecedents, "the manor of Barrow Minchin, the mansion-house, called Barrow Court, and the park." Assuming even the true construction to be that the words refer to the manor alone, there is sufficient evidence in this case to show that the farm and premises in question are in fact part of the manor, or were so reputed to *be, and the testator may have believed that they did belong to the manor. To [*687 construe this clause so as to make the testator die intestate as to any part of his real property, and more especially as to any part of it connected with the Barrow estates, will be wholly inconsistent with the intention manifested by the general scope of the will, and by the particular words of several passages in it. (In support of this position he referred to various passages in the will, which are commented on in the judgment of the Court.) The word "belonging" has no definite legal sense. It is used to denote property: it is also very commonly employed to convey the idea of relation or connexion; and in this sense, the lands in question, if they have been known and used as a property connected with the manor, may be said to belong to it, though they do not absolutely form part of it. A jury would probably infer from the fact of the gamekeeper having shot over them, that they were part of the manor; and the Court may, by the terms of the special case, draw such conclusion in fact as a jury might draw.

He then cited *Bodenham v. Pritchard*, 1 B. & C. 350, *The Vicars Choral of Lichfield v. Ayres*, Sir W. Jones, 435, *Goodtitle v. Southern*, 1 M. & S. 299, and *Ongley v. Chambers*, 8 B. M. 665, for the purpose of showing that the premises in question might pass with the manor by the words "thereunto belonging," though not accurately descriptive of the relation of that property to the manor.

For the defendant it was contended, that the lands in question did not pass; that it was incumbent on the plaintiff to show conclusively that they did, for the heir *at law could not be disinherited by intendment; that the words [*688 *thereunto belonging* would denote lands which had been enjoyed with the manor for a number of years, and had either descended from father to son with the manor, or been so usually occupied with it, that in an ordinary sense they might be said to belong to the same estate; but they would not apply to newly purchased estates which never had been held with the manor, or even been in the family of the testator before the purchase in October 1800. Then, that being so (it was contended), the description of the lands consists of two necessary terms: one is, that they be within the parish of Barrow Minchin and Barrow Gurney; another, that they belong to the manor of Barrow Minchin, in the sense just now pointed out. Now there were lands which corresponded in both particulars with this description, and which undoubtedly, passed by the devise. The words, therefore, of this part of the will are satisfied without being construed as carrying the lands in question, if they do not correspond with the description in both particulars; that is, if they do not both belong to the manor, and lie within the parish. *Doe dem. Ryall v. Bell*, 8 T. R. 579, *Doe dem. Parkin v. Parkin*, 5 Taunt. 321, *Doe dem. Dell v. Pigot*, 7 Taunt. 553, *Doe dem. Tyrrell v. Lyford*, 4 M. & S. 550. In *Bodenham v. Pritchard*, 1 B. & C. 350, stress was laid upon the words "as now enjoyed by me;" and the land in question had been enjoyed, as it was at the time of the devise, for many years. Then, if the words "thereunto belonging" apply to the manor, and the testator intended them as a designation of the lands which were to pass by the will, no extrinsic evidence is admissible to show what the intention of the *testa- [*689 tor was, but that must be collected from the will itself; for there was no ambiguity raised by the extrinsic circumstances, inasmuch as the testator had lands in the parish of Barrow Minchin and Barrow Gurney belonging to the manor of Barrow Minchin, which fully satisfied the description: *Doe dem. Oxenden v. Chichester*, 4 Dow. 65; 1 Phil. on Evi. 516, 6th ed. Evidence that the lands in question answered the description in the will, and that they had been occupied and formed one estate with the manor, was undoubtedly admissible, but no such evidence was or could be given. *Cur. adv. vult.*

Lord TENTERDEN, C. J., now delivered the judgment of the Court.

Our opinion in this case is founded upon the will of the testator, together with such only of the extrinsic facts as furnish the date of the purchase and the situation of the lands in question, and show that William Gore Langton, the defendant, was the eldest son of the testator, and had married a lady of fortune, and taken her surname of Langton in addition to his own; and that the ancient seat of the Gore family was at Barrow, the eldest son residing at Newton Park; and all these facts were undoubtedly admissible in evidence.^(a)

It appears by the will itself, that the testator had, on the marriage of his eldest son, settled some estates upon him and that he was desirous that his devised estate at Barrow should be held by members of his family bearing the name of Gore; for those estates are settled upon his first and other grandsons (the sons *690] of his younger *son the Rev. Charles Gore) in tail male; and in default of such issue, upon the third son of his eldest son Gore Langton, and his first and other sons in tail male, with a direction that the persons who may become entitled thereto (except his son Gore Langton, who is to hold for a term of twenty years) shall use the surname of Gore only. By the will some other estates are devised to his son Charles Gore, with a remainder to his first and other sons in tail male, with a remainder to the same third son of the testator's eldest son, and his first and other sons in tail male, and a like remainder to the second son of his son Gore Langton, and his first and other sons in tail male, but without a direction to take the name of Gore. The advowson of a vicarage and some other lands are given to his second son Charles in fee; and a messuage is given to the third grandson in fee. There are also specific bequests of arrears of rent, and of some accruing rents, and of various sums of money and other personalty, a provision for the testator's widow on a release of her dower, and a residuary clause affecting only the personal estate.

The will is very long, and in many parts very minute, and it is impossible to read it without forming an opinion that the testator supposed he had devised everything that he *then* possessed; and it is admitted that he had so done, with the exception of the lands in question. These lands were conveyed to the testator between three and four months before the date of his will; they adjoin, and are in some parts intermixed with the ancient Barrow estate; they are in the same parish, and were treated by the gamekeepers of the testator and the defendant as part of the reputed manor of Barrow Minchin.

*691] *The question arises upon the use of the words *thereunto belonging* in the devise under which the plaintiff claims. It is contended for the defendant, that these words are a material part of the description of the tenements devised, and that the testator had held the tenements in question for so short a time that they cannot have become, by reputation, an appurtenant to Barrow Court or the manor of Barrow Minchin. The clause runs thus: "All that my manor or reputed manor of Barrow Minchin in the county of Somerset, together with the mansion-house called Barrow Court, *thereunto belonging*, and the park; and also all and singular my freehold messuages, lands, tenements, and hereditaments *thereunto belonging*, situate, &c., in the parish of Barrow Minchin and Barrow Gurney." A description of various other lands then follows; and the clause declaring the uses of the devise of the lands first mentioned runs thus: "All that my said manor or reputed manor of Barrow Minchin, together with the mansion-house called Barrow Court, and the park *thereunto belonging*; and all and singular my freehold messuages, lands, tenements, and hereditaments *thereunto belonging*, situate in the parish of Barrow Minchin and Barrow Gurney aforesaid."

It is obvious that the words *thereunto belonging* are used in this will in a very negligent manner, not only in the passages in question but also in several other parts of the will.

In the first clause the park is not mentioned by itself as belonging to the

(a) See *Lowe v. Lord Huntingtower*, 4 Russ. 532, n.

manor or the mansion. In the second clause the place of the word "park" is changed, and it is mentioned as belonging either to the manor or the mansion, according to the antecedent to which the reader may choose to refer it. In the first clause, also, *if the words *thereunto belonging*, the second time they occur, are to be referred to the nearest antecedent, they will be referred [*692 to the park. In the second clause they certainly cannot be referred to the park, but must be referred to the manor or the mansion. And it seems most reasonable to refer them to the manor, for then the word "thereunto" will refer to the same antecedent in both members of the sentence. It will, therefore, be proper to consider in what sense the words "*thereunto belonging*" are to be understood in this will; and the sense that will best accord with the intention of the testator, as it may be collected from other circumstances, and other parts of the will, is the sense that ought to prevail. These words are, in common speech, of different import, according to the subject of which they are spoken. If we speak of a farm or field with reference to the ownership, we say it belongs to such a one, meaning, thereby, that it is the property of that person; if with reference to any estate of a particular name, we say it belongs to such an estate, as to the Britton Ferry estate, meaning that it is parcel of that estate; if with reference to its locality, we say it belongs to such a parish or township, meaning that it is situate in and part of that parish or township; and so with reference to a manor, we say it belongs to such a manor, meaning that it is situate in or part of that manor, in the ordinary and popular sense of the word "part," and not in the strictly legal sense, as part of the demesnes of the manor, or as holden of the manor or of the lord thereof.

It sometimes happens that the language of one will is so nearly like that of another, as to make a decision upon the first a plain authority to govern the second; *but this does not always happen, and very small changes of language have often led to a difference of interpretation. The extrinsic [*693 facts in this case leave no room to doubt that the testator intended his newly-acquired property to pass by his will as part of his Barrow estate; but, nevertheless, it cannot pass unless that meaning can be collected from the will itself; and there are two clauses in the latter part of the will which appear to manifest that intention, and to be sufficient to authorize us to put such a construction on the words *thereunto belonging* as will accord with, and give effect to, that intention. These clauses provide for some of the arrears of rent, and for the charge of two annuities. The first of them is in these words: "I give to my executors all arrears of rent which shall be due to me at the time of my death, from any tenant or tenants of my estate in the parish of Barrow aforesaid, upon trust to lay out the same in repairing the farm-houses and buildings appurtenant thereto, and in draining the lands for the best and utmost improvement of the same." The first part of this clause will evidently include the arrears of rent of the newly-purchased property; and the direction in the last part seems to be sufficiently general to allow the arrears of one tenement to be applied to the improvement of another, where they might be more wanting, which would show that he considered all that he had in the parish of Barrow as one estate. The same is manifested by the clause whereby, after giving two small annuities, the testator adds, and "I do hereby charge my estate at Barrow with the payment of the same." It is impossible to suppose that the testator intended a division of this charge between his old and his newly-acquired property. And if, by the true *construction of the first of these clauses, the arrears of rent are to be [*694 applied to the improvement of the particular tenement out of which they issued; then, if the tenements in question do not pass by the will, the testator will have devised the arrears of the rent of tenements not disposed of by his will, which he cannot be supposed to have intended. Nor can it be supposed that he intended the arrears of the rent of the lands in question to be part of the residue of his personal estate; for it will be found, by examining the other parts of the will, that he has devised the arrears of the rents of his several other estates to the persons who were to take those estates after his death, not leaving any of them to fall into the residue.

The intention, then, of the testator being clear, supposing the words "thereunto belonging" were not found in the will, we are to consider whether such a sense can be given to those words as will agree with that intention. It is found as a fact in the case, that the limits of the manor of Barrow Minchin extend beyond the hamlet of that name, and comprise lands in the hamlet of Barrow Gurney, and lands adjoining the lands in question. The leases which were produced in evidence mention two closes only of those lands, and, therefore, they have not been taken into consideration. It is, however, found as a fact, that the gamekeeper of the manor was in the habit of shooting over the lands in question for several years before they were bought by the testator, as well as afterwards, in the time both of the testator and of the defendant; and the Court is, according to the terms of the special case, to draw, if necessary, such conclusions, in point of fact, as a jury might have done. Now, although the *695] acts of a gamekeeper may have little weight in the estimation of lawyers, they have often much weight with country gentlemen, and I do not doubt that a jury would have inferred, from the whole evidence, that the lands in question were within the limits, and part of the manor. And considering them to be so, the words "thereunto belonging" may be understood to mean situate within, it being, as has been before noticed, by no means unusual in common speech to speak of land lying within a manor, parish, or other district, as belonging thereto. In the decided cases in which these words have occurred, and wherein it was held that property in question did not pass, the character of the property was such as not to admit this interpretation of the words.

For these reasons, and without impugning the principles upon which the argument for the defendant was founded, or the authority of the cases quoted, we think ourselves warranted in deciding that the lands in question pass by the will; and, consequently, the *postea* is to be delivered to the plaintiff.

Postea to the plaintiff

WHITWORTH v. HALL.

In an action for maliciously suing out a commission of bankrupt, it must be averred and proved that the commission was superseded before the commencement of the action: and if this fact be not proved, the plaintiff ought to be nonsuited, though it was not averred in the declaration, and though the defendant, who might have demurred for the omission, has not done so.

CASE for maliciously, and without probable cause, suing out a commission of bankruptcy against the plaintiff. Plea, not guilty. At the trial before Alexander, C. B., at the Summer assizes for the county of Derby 1830, the plaintiff's counsel having stated his *case, *Goulburn*, Serjt., objected that the *696] action was not maintainable, because it was not averred in the declaration, nor could it be proved, that the commission had been superseded; and he cited *Matthews v. Dickinson*, 7 Taunt. 399, which was a similar action, and in which Gibbs, C. J., said, "unless the commission was superseded, the action could not be supported." The learned Judge thought the objection fatal, but refused to nonsuit the plaintiff, on the ground that the defendant ought to have demurred to the declaration; and he made the cause a remanet, to give the bankrupt an opportunity of obtaining a supersedeas before the next assizes.

Goulburn, in the following term, obtained a rule nisi for entering a nonsuit.

The *Attorney-General* and *Fynes Clinton* now showed cause. The want of an averment, that the commission was superseded, was a good ground of demurrer, and the defendant not having demurred, the learned Judge was right in refusing to nonsuit, and in allowing the bankrupt an opportunity to get the commission superseded. [PARKE, J. If the objection was fatal, the learned Judge ought to have nonsuited the plaintiff; for if the case were to go down

again to trial, proof that the commission had been superseded since the cause last came on would be no answer to the action.] It must be conceded that, in general, an action for the malicious and unreasonable prosecution of an action by bailable process, or of an indictment, cannot be maintained until the action or indictment so *vexatiously instituted has been determined in due course of law in favour of the party sued or prosecuted, and that the [*697 omission to show such termination of the former proceeding renders the declaration defective if demurred to, but a distinction may be drawn in the case of maliciously suing out a commission. There it is in the discretion of the Lord Chancellor to determine the proceeding by supersedeas, or not, at his pleasure. The validity of a commission may as well be tried in an action of this kind as in one of trespass or trover. At all events after verdict, it would be presumed to have been proved at the trial that the former prosecution was ended: 1 Wms. Saunders, 228, n. (7). In *Matthews v. Dickinson*, 7 Taunt. 399, a supersedeas was averred in the declaration, and the question was, whether, being averred, it was duly proved. The dictum of Gibbs, C. J., in that case is the only authority against the plaintiff. [Lord TENTERDEN, C. J. That was the opinion of one of the most learned and acute judges that ever sat in Westminster Hall. An action cannot be supported for maliciously holding to bail without showing that the proceedings were at an end; and yet the discharge from arrest is in the discretion of the Court. Such a case, therefore, is not distinguishable from the present. TAUNTON, J. In *Matthews v. Dickinson*, 7 Taunt. 399, the variance would have been wholly immaterial, if it had not been necessary to show that the commission had been superseded.]

Lord TENTERDEN, C. J. If a commission of bankrupt be sued out without any reasonable or probable *cause, we must assume that the Lord Chan- [*698 cellor would supersede it. There is no sound distinction as to the point raised in this case, between a malicious prosecution by indictment, or a malicious arrest, and a malicious suing out of a commission of bankrupt. Then, as to the want of the averment in question being cured after verdict; in this case there was no verdict, and the objection was not merely, that the declaration did not contain such an averment, but that if it had been there, it was not capable of proof.

LITLEDALE, J. There is no distinction between an action for a malicious prosecution by indictment, or for a malicious arrest, and one for maliciously suing out a commission of bankrupt. In all of them, it is necessary to show that the original proceeding which formed the alleged ground of the action is at an end.

PARKE, J. It seems to be involved in the proposition, that the commission was sued out without reasonable and probable cause, that such commission must be superseded before the action be commenced, for the very existence of the commission would be some evidence of probable cause. The rule for entering a nonsuit must be made absolute.

TAUNTON, J., concurred.

Rule absolute.

*The KING v. BUMSTEAD.

[*699]

By charter, the company of Patten makers were made a corporation, having a master, two wardens, and twelve assistants, and the company were to elect yearly one of the two wardens to be master.

By a by-law afterwards made and agreed to by the whole company, the master was from thenceforth to be elected by the master, wardens, and assistants for the time being in a particular mode (not prescribed by the charter) out of two or three meet and sufficient persons, being of the number of the master, wardens, and assistants, and selected by the master and wardens. In case of an equality of voices the master was to have a double vote:

Held, that the by-law was bad, because it extended the number of persons eligible by the charter to the office of master: and (per PARKE, J.) semble that it was also bad because the election was required to be in a particular mode not prescribed or sanctioned by the charter.

A RULE had been obtained calling upon the defendant to show cause why an information in the nature of a quo warranto should not be exhibited against him to show by what authority he claimed to be master of the fellowship of the Patten-makers' company of the city of London, on the ground that he was not elected to that office by the company at large as directed by their charter, but by the master, wardens, and assistants only.

By charter of the 2d of August, 1670, the patten-makers within the cities of London and Westminster, and ten miles thereof, were constituted a body corporate, by the name of "The Master, Wardens, Assistants, and Fellowship of the Company of Patten Makers of the city of London," and there were to be one master, two wardens, and twelve assistants of the company, to be continued as thereafter mentioned. One Granger was named the first master of the company, to continue from the date of the charter until the 25th of March, 1671; and on the Thursday next before that day, the *master, wardens, and assistants*, of the company were to elect one of the wardens of the company thereafter named to the office of master, to continue in that office from the said 25th of March, 1671, until the 25th of March, 1672. J. T. and J. B. were then named to be

*700] the first *two wardens of the company from the date of the charter until the 25th of March, 1671; and on Thursday next before that day, the *master, wardens, and assistants* of the company were to meet and elect some other fit person, being one of the assistants of the company, to be warden of the company for the year next ensuing, in the place of him who should be chosen master. The charter then ordained, that it should be lawful for the *company* of patten-makers and their successors, for that purpose assembled, yearly on every Thursday next before the 25th of March *for ever thereafter*, to elect and choose *one of the wardens* of the company to be master for the year then next ensuing, and also at the same time to choose one of the assistants to be warden for the then next year; and every master and warden so from time to time leaving his and their places of master and wardens respectively at the end of their year, should then instantly become assistant and assistants in the room of him or them that should be so chosen out of the assistants to be master and warden; and that when the master and wardens, or any of them, at any time within one year after they were chosen into their office should die, or be removed from their office (which they might be, for just and reasonable cause), by the *master, wardens, and assistants*, it should then be lawful for such and so many of the said *master, wardens, and assistants* who should be then living, or the greater part of them, at their will and pleasure, to elect one or more of the said wardens or assistants to be master, warden, or wardens of the company, according to the provisions in the charter before expressed, to exercise such office until the 25th

*701] of March next ensuing such their *election. It then named twelve persons to be assistants for life, if not removed for just cause, and described their duty; and upon the death or removal of any assistants, the master, wardens, and remaining assistants were authorized to elect as such so many other persons out of the company as the case should require, to make up the number of assistants. And it empowered the master, wardens, and assistants to make by-laws for the government of the company, and of persons exercising the trade, both in matters concerning the trade, and in their offices, functions, &c., concerning the company.

By a by-law made by the master, wardens, assistants, and *fellowship* of the company on the 27th of October, 1673, it was, amongst other things, ordained, that from thenceforth yearly for ever, the master, wardens, and assistants of the company should assemble in the forenoon of Thursday before the 25th of March, and should proceed to the election of one master and two wardens for the next ensuing year, in manner following:—First, the master and wardens for the time being should agree and present to the assistants there assembled the names in writing of two or three *meet or sufficient persons*, being of the number of the then present *master, wardens, and assistants*, which two or three persons should immediately withdraw themselves; after which the said *master, wardens, and*

assistants who remained should, by majority of voices, upon the question put by the present master, or one of the wardens, or by their ink with a pen marked upon paper where their names were, elect and make choice of one of those two or three persons so presented in writing, to be master of the company for one year thence next following, until another should be elected, chosen, and sworn; and for *more orderly proceeding, the youngest assistant then present was to give the first voice, or first ink or score with a pen, &c., and so [*702 ascending orderly to every other assistant, warden, and master, until every one had given his voice or ink; and in case the voices, &c., should be even in number, then the present master should have a double voice or mark for the final determination of the new master, which person so elected should, upon the 25th of March then next following, take the oath of master, &c.

Since the year 1679 the election of the master had been uniformly made by the master, wardens, and assistants of the company, in the manner pointed out by the by-law; and on Thursday, the 24th of March, 1831, the then master and the then wardens of the company presented to the assistants the names in writing of the defendant and A. Bidpath, as two meet and sufficient persons (being of the number of the then present master, wardens, and assistants of the company, and the latter being one of the wardens), for one of them to be elected to the office of master for the ensuing year; and the majority of the master, wardens, and assistants elected the defendant in the manner and according to the form prescribed by the by-law.

The *Attorney-General* and *Follett* now showed cause. By the charter the right of electing the master is vested in the corporation at large, but they were parties to the by-law, and thereby delegated their right of election to the master, wardens, and assistants, and *Rex v. Westwood*, 4 B. & C. 781, is an authority to show that they might do so. [Lord TENTERDEN, C. J. The charter directs that the *company of patten-makers shall elect one of the wardens to be master. The by-law does not require that the master elected [*703 shall be one of the last wardens. Is not the effect of the by-law, therefore, to vary the constitution?] A by-law narrowing and restraining the right of election is bad, but here the by-law extends the number of those who are eligible, and such a by-law is not inconsistent with any principle, nor is there any authority to show that it is void. It is true that by this by-law, the master may be elected from the master, wardens, and assistants, whereas the charter requires that one of the wardens should be elected. But as every master and warden going out of office becomes an assistant, it must have been contemplated, that in course of time, the whole of that body would be composed of persons who had previously served the office of warden. And if that be the case, the person required for the office of master, according to the by-law, must have all the qualifications required by the charter.

Curwood, *contra*, was stopped by the Court.

Lord TENTERDEN, C. J. This by-law is bad, not merely on the ground that it extends the number of those eligible, but also because it varies the constitution of the corporation (as fixed by the charter) in this respect, that if the mode of election pointed out by the charter be pursued, the same person cannot be master for two successive years; but if that prescribed by the by-law be adopted, he may. In this case the defendant is not aided by the mode pursued at the particular election in question, for the two persons out of whom the choice was to be made, were not the two wardens, which according to the charter they ought to be.

*LITTLEDALE, J. This by-law appears to me contrary to the charter, [*704 because the effect of it is to extend the number of persons eligible.

PARKE, J. This is not a case where the corporation at large have, by a by-law, merely delegated the power of election, which they possessed before, to a select body; because here, by the charter, the master is to be elected from particular persons, viz., the two wardens, but by the by-law he may be elected from among other persons, viz., the master and assistants. If such a by-law

were good, the charter might be wholly defeated. It appears to me, therefore, that the by-law is invalid altogether on that ground. I think also, that that part of the by-law which regulates the election is void, because the right to elect is thereby delegated to the select body on condition that they elect in a certain mode, which is not directed or sanctioned by the charter. The select body, therefore, have not the power which was given by the charter to the corporation at large.(a)

TAUNTON, J. A corporation have no power to make a by-law contrary to their constitution. That is one of the first elements of the law of corporations. Then the question is, whether this by-law be not contrary to the constitution of this company. I think, as the charter says that the master shall be taken out of a select and limited number of persons, it was not competent to the corporation to enlarge that number, and say that the master should be taken out of *705] any other body. I allow that if a by-law consist of two parts, *each part being in itself entire, and capable of being separated from the other, the circumstance of one entire and separate part of that by-law being bad will not vitiate the other.(b) But here the parts are all blended together and consolidated in one mass, and cannot be separated, so that if the by-law be bad in part, it must of necessity be bad altogether. The rule must therefore be made absolute. Rule absolute.(c)

(a) Where, by charter, the election is to be by the majority of a particular body, a by-law giving the presiding officer a casting voice in case the votes are equal, is bad. *Rex v. Ginever*, 8 T. R. 732.

(b) *Player v. Vere*, Sir T. Raym. 288, 324. *Rex v. The Fishermen of Faversham* (per Lord Kenyon), 8 T. R. 352.

(c) See *Rex v. Tucker*, 2 Selw. N. P. 1170, 8th edit.

KIDD v. WALKER.

Where a defendant, sued upon a security carrying interest, pays money into Court sufficient to cover the principal, with interest down to the commencement of the action, but not to the time of paying in the money, the plaintiff may proceed, and a jury, on trial, is bound to give him damages for the interest accruing between the commencement of the action and the payment into Court.

THIS was an action for breach of covenant in not paying a sum of money, with interest, according to indenture made between the plaintiff and defendant. The defendant paid money into court, and pleaded *solvit ad diem*. At the trial before Vaughan, B., at the Winchester summer assizes 1830, it appeared that enough had been paid to cover the plaintiff's demand, with interest down to the time of commencing the action, but not interest to the time when the money was paid into court. The learned Judge directed a verdict for the defendant, giving leave to move that a verdict might be entered for the plaintiff for 3*l.* 12*s.*, the interest claimed as accruing after the commencement of the action. A rule nisi having been obtained to that effect,

Follett now showed cause. This is an attempt to take advantage of a mistake, *706] and the question, therefore, *is, whether there be any principle of law compelling the Court to yield to such an objection. The rule laid down in *Robinson v. Bland*, 2 Burr. 1077, will be cited on the other side; but it may still be inquired whether the jury, in a case like the present, were absolutely bound to adopt that rule, and give damages covering the interest down to the time of payment. Now "when money is brought into court, unless the plaintiff will accept it with costs in discharge of the suit, it is considered as paid before action brought, and struck out of the declaration; and the action proceeds for the residue of the demand in like manner as if it had been originally commenced for that only." 1 Tidd, 624, 9th ed. If, then, upon the action so proceeding, it appear that the whole principal has not been paid, the jury ought to give

damages equal to the amount of interest accruing until the whole principal is recovered: but if it be found that no part of the principal was unpaid (that is, that it was covered by the money paid into court), the jury are not then obliged to give any damages; for they may consider the whole principal as having been discharged before the commencement of the action. [PARKE, J. If the full interest be not satisfied at the time of the payment into court, will such payment be considered as a discharge of the principal before action brought?] The rule of Court, on paying in money, orders that the amount shall be struck out of the declaration. Now, if that sum be struck out, and it appear that nothing else was due, there can be no foundation for a claim of interest between the commencement of the action and the payment. There is no case in which it has been *decided that interest is demandable down to the time of paying the money into court: and if the jury were not imperatively called upon to [*707 give damages, there is no reason that the Court should now direct a verdict for the plaintiff.

Lord TENTERDEN, C. J. A jury is bound to find a verdict according to law, and it must be supposed that if the plaintiff was legally entitled to the sum of 3*l.* 12*s.* here claimed, the jury meant to give it. I think he was so entitled. If the practice of paying money into court were to deprive a plaintiff of any part of his demand which he would otherwise be enabled to recover, it would work great injustice. Here the sum in question is very small; but it might happen that the declaration was filed at the end of Trinity term, and the money paid into court in Michaelmas term; in such a case, if the argument now used were to prevail, a plaintiff would lose, and a defendant save, more than four months' interest. In the present instance there appears to have been a slip on the part of the defendant; but it is one which the plaintiff is entitled to take advantage of.

LITTLEDALE, PARKE, and TAUNTON, Js., concurred. Rule absolute.
C. F. Williams and Coleridge were to have supported the rule.

*The Master, &c., of the Company of APOTHECARIES, v. BENJAMIN GREENWOOD. June 8. [*708

A. bound himself apprentice to an apothecary, who resided eight miles from H. The apothecary then took a house at H., in which A. resided, and attended several patients there, the apothecary coming over occasionally, and being consulted by the defendant about the patients: Held, that this was a practising by A. as an apothecary within the meaning of 55 G. 3, c. 194, s. 20.

THIS was an action brought to recover penalties for practising as an apothecary without the certificate required by the statute 55 G. 3, c. 194, s. 20.

At the trial before Park, J., at the Summer assizes for the county of York 1830, the following appeared to be the facts of the case:—

The defendant was of the age of twenty-four. He had been resident with his father, an apothecary, and also with two other apothecaries, for more than five years in the whole; the latter of them, named Drake, lived at Halifax, and the defendant was assistant to him for two years. His brother, John Brooke Greenwood, was also an apothecary, and resided at Gomershall, eight miles from Halifax, and practised there. On the 25th of October, 1828, the defendant was bound apprentice to his brother by a regular indenture. Upon this the brother took a house and opened a shop at Halifax, and the defendant resided on the premises so taken. The brother, according to his own testimony, went to Halifax several times every week, and was consulted by the defendant about some of the patients; and it appeared that he had visited one family. It was proved that the defendant had visited and given medicine to several patients, some of whom knew him when he was with Drake at Halifax. The defendant never received anything for his attendances, and his brother was paid for the medi-

cines furnished. Upon this it was objected, that there was no evidence that the defendant had ever practised as an apothecary. The learned Judge directed the jury to *find a verdict for one penalty of 20*l.*, but reserved liberty to the *709] defendant to move to enter a nonsuit. A rule nisi having been obtained for that purpose,

Coltman on a former day in this term showed cause. The question in this case is, whether an apothecary's apprentice may, on the faith of that apprenticeship, attend patients in the absence of his master, without being liable to penalties for having acted as an apothecary within the meaning of the 55 G. 3, c. 194, s. 20.(a) It might, perhaps, have been a question of fact whether the defendant practised as an apprentice or an apothecary. The master surely cannot have a right to disperse his apprentices over the country, and to receive the money for their attendance. The apprentice ought to have his master's instruction in each particular case. This is clearly a case within the mischief contemplated by the legislature, and also within the words of the penal clause.

F. Pollock and *Cresswell*, *contrâ*. The question is, whether the acts done by the defendant in this case amounted to a practising as an apothecary, or whether the defendant did not practise as an assistant merely. Now section 21 enacts, *710] that no apothecary shall be *allowed to recover any charges unless he shall prove that he was in practice as an apothecary before or on the 5th of August, 1815, or that he has obtained a certificate to practise as apothecary from the master, warden, and Society of Apothecaries. In *Brown v. Robinson*, 1 Carr. & Payne, 264, to prove that the plaintiff had practised as an apothecary before the 5th of August, 1815, three witnesses stated that he had attended them as an apothecary before that day, but that during the whole time of such attendance he was an assistant in the house of another apothecary, though they always paid the plaintiff. Lord Tenterden, C. J., held that to be no proof that he practised as an apothecary, and he is reported to have said, that no practice while in the service of another, can be a practising as an apothecary under the act. In *Rose v. College of Physicians*, 5 Bro. P. C. 553, vol. i. 78, in error, it was held, that an apothecary who made up and administered medicines without license or the direction of a physician, but who demanded and took no fee for his advice, did not practise physic within the meaning of the statute 14 & 15 Hen. 8, c. 5. These authorities show, that a *practising* must be for the party's own profit. Here that was not the case. If the acts done by the defendant in this case amount to a practising as an apothecary, every interference of an apprentice with a patient, without consulting his master, even though he be absent, the administering even of a dose of medicine, must be equally so. Here the defendant acted *bonâ fide* as an apprentice. If he were liable for any penalty, it would be for acting as assistant without having obtained a certificate, which is a distinct offence, subjecting the party to a different forfeiture.

*711] *Lord TENTERDEN, C. J. If the defendant in this case be not the apothecary, then his brother must be. Now, could the latter maintain an action against patients whom he never saw? We will take time to consider of our judgment. *Cur. adv. vult.*

The judgment of the Court was now delivered by

Lord TENTERDEN, C. J.; who, after stating the facts of the case, proceeded as follows:—

It was argued for the defendant, that if he should be considered as practising within the terms of the act, every apprentice to an apothecary who, in the ab-

(a) Section 20 enacts, "That if any person (except such as are then actually practising as such) shall after the 1st day of August, 1815, act or practise as an apothecary in any part of England or Wales, without having obtained such certificate as aforesaid, every person so offending shall, for every such offence, forfeit and pay the sum of 20*l.*; and if any person (except such as are then acting as such, and excepting persons who have actually served an apprenticeship as aforesaid), shall after the said 1st day of August, 1815, act as an assistant to any apothecary, to compound and dispense medicines, without having obtained such certificate as aforesaid, every person so offending shall, for every such offence, forfeit and pay the sum of 5*l.*"

gence of his master, should give attendance, advice, or medicines, might be so considered. We think, however, that no such consequence will follow.

The act does not in terms require a practising on the party's own account; and it must be obvious that if a case like the present be not within the act, a door will be opened whereby the objects of the act may be evaded, and there may be a practising at several towns under one certificate, and at some of them by persons, under the name and colour of apprenticeship, with little or no benefit to the patients from the skill or knowledge of the person who has obtained the certificate. We think the only safe rule is to confine the practice of apprentices to the residence of their master, whereby the patients may in general have the benefit of his skill. In the present case few of the patients could have that benefit in any degree. We think, therefore, the defendant incurred the penalty of the statute, and consequently the rule must be discharged.

Rule discharged.

***The KING v. BENETT and BROUGHTON, Esquires, Justices of MIDDLESEX. June 9. [712**

Under the statute 59 G. 3, c. 12, s. 33, an Irish female pauper having a bastard child born in a parish in England, and within the age of nurture, may, on becoming chargeable, be passed to Ireland, though the child cannot be sent with her, the act not authorizing the removal of any settled person.

CATHERINE HINES, an Irish pauper, being pregnant, was, at her own request, on the 9th of March, 1831, admitted into the workhouse belonging to the parish of St. Luke, Middlesex, and on the 23d was there delivered of a male bastard child. She resided in the workhouse from the time of her admission; and was, during that time, chargeable to the parish. On the 6th of May the parish officers took her before the defendants, William Bennett, Esq., and Robert Edwards Broughton, Esq., two magistrates for the county, and required them, by a pass under their hands and seals, to cause her to be removed, and her infant child also, for the purpose of nurture. They refused so to do. A rule nisi was afterwards obtained for a mandamus to compel them to sign an order or pass for the removal of the pauper with her male bastard child (for nurture only) from the said parish of Saint Luke to Ireland, in the manner directed by the statutes in such case made and provided. In the present term

The defendants showed cause in person against the rule. The act 59 G. 3, c. 12, s. 33, empowers two justices to remove natives of Scotland or Ireland not settled in England, and who have actually become chargeable, together with their children, so being chargeable and not settled in this country, to the place of their birth or last legal settlement. But a bastard is settled where *born; and although, when the mother is settled in a different place, and is removed thither, the child may be sent with her for the purpose of nurture, that can only be to a place in England, where the child may still be maintained out of the parish funds, at the expense of the place in which it was born, and which is liable for such maintenance. Rex v. Hemlington, Cald. 6, Doug. 9, n. (2). But if the child is sent to Ireland, where there are no poor-laws, it must lose the benefit of this maintenance; and if the mother dies, must be altogether destitute, as no order could be made for its relief. The child, therefore, ought not to be removed to Ireland; and as an infant within the age of nurture cannot be separated from its mother, she also must remain. It may be said that this renders the act nugatory with respect to the mothers of bastards born here; but, on the other hand, if the child remain in this country, the father may be called upon to support it; if it be removed with the mother, the recourse to him is lost; and this might give an opening to much oppression, as well as an encour-

ragement to immorality. Another objection to this rule is, that it is an attempt to compel magistrates to come to a particular decision. The Court, in *Rex v. The Justices of Middlesex*, 4 B. & A. 298, refused to interpose for such a purpose. The magistrates here have not refused to exercise their jurisdiction, but have heard, inquired, and decided to the best of their judgment. [Lord TENTERDEN, C. J. The statute is imperative if the parties come within it. PARKE, J. It is a mere question of law, what the act requires. No discretion is given.] The act makes no provision for the case of bastard children.

*714] **Law and Heaton, contrà.* The mother, who is chargeable, and not settled in England, must be removed by the express words of the statute. Supposing that in this case the infant cannot be separated from its mother, the consequence will then be, that it must be removed with her, upon the principles of general policy adverted to by the Court in *Rex v. Leeds*, 4 B. & A. 498. That case shows that a wife, although having a maiden settlement in England, may be removed to Ireland or Scotland, when the husband is sent thither in pursuance of the statute. Where the mother is removed from one place to another in England, her child, within the age of nurture, must go with her, although it be settled in a different parish from that to which she is removed, *Skeffreth v. Walford*, 2 Bott, pl. 11, 6th edit.; and it must still be supported in the new place of residence by the parish to which it belongs, *Rex v. Hemlington*, Cald. 6, Doug. 9, n. (2), notwithstanding the inconvenience, which might be alleged in that case as well as in the present, where the parishes are distant from each other. The act 59 G. 3, c. 12, s. 33, speaks of persons who have become chargeable by themselves, or "his or her family," and may therefore be deemed to contemplate the removal of all, even in cases like the present.

Cur. adv. vult.

Lord TENTERDEN, C. J., now delivered the judgment of the Court.

This case was very well argued in the course of this term. The difficulty is in saying what precisely ought to be done under the statute 59 G. 3, c. 12, s. 33, *715] which *provides for the removal of Irish and Scotch paupers in the mode pointed out as to rogues and vagabonds by 17 G. 2, c. 5, s. 13, 14. It was said, in support of the rule, that where a woman settled in one parish in England had a bastard child born in another parish also in England, it had been usual to remove the child with the mother for nurture, and that it was then taken care of by the parish to which it was sent, at the expense of the parish where it was settled by birth. On the other hand it was contended, that the child having a settlement in the parish where it was born, the act of parliament gave the justices no power to remove it; and it was observed, that where a child was removed with its mother from parish to parish in England, no difficulty arose, because one parish or the other was obliged to give it present support, but that in Ireland, where there are no poor laws, there was no parish which could be called upon to nurture the child, nor any one to enforce maintenance from the place of its birth. There was much weight in those observations. There may certainly be great inconvenience in separating the mother and child; still, if the law gives no authority to remove the child, that inconvenience cannot be avoided, while the law continues as it is. And it is clear that by 59 G. 3, c. 12, s. 33, no such power is given. That section requires two justices, upon complaint that any person born in Scotland or Ireland hath become chargeable to a parish by himself or herself, or his or her family, to inquire whether he or she, or any of his or her children have any settlement in England, and if it shall be found that such person was born in Scotland or in Ireland, has no settlement in England, and has become chargeable to such *716] parish *by himself or his or her family, then by a pass to cause such poor person, his wife, and such of his or her children as shall not have gained a settlement in England, to be removed to the place of his or her birth in the manner directed by the 17 G. 2, c. 5, s. 13 and 14. The statute, therefore, authorizes and requires the justices to remove to Ireland the mother who has not gained any settlement in England; but it gives them no power to

remove the child which has acquired a settlement there by its birth. There may undoubtedly be hardship in removing the mother without the child, but that must be submitted to, for the act is imperative. The rule, therefore, must be made absolute as to the removal of the mother, and discharged as to that of the child.

Rule absolute for the removal of the mother,—
discharged as to that of the child.

KEARSEY, Assignee of the Estate of HAVISIDE, a Bankrupt,
v. CARSTAIRS and Others. June 11.

By indenture of demise, reciting that the lessee had purchased certain fixtures on the premises, on condition of their being repurchased as after mentioned, it was agreed between the lessor and lessee, and the lessor covenanted, that on the expiration or other sooner determination of the term, he, the lessor, should and would take the fixtures at such price as they should be appraised at by two competent persons, one to be named on each side.

The lessee became bankrupt, and his assignee declined the lease (which was delivered up), but he required the fixtures to be repurchased, and brought an action of covenant against the lessor for not appointing an appraiser: Held, that as by 6 G. 4, c. 16, s. 75, the bankrupt, on delivering up the lease, was discharged from all the covenants on his part, performance of the covenant in question could not be enforced by the assignee against the lessor.

COVENANT. The declaration stated that by indenture made between the defendants and Haviside before his bankruptcy, the defendants demised premises to Haviside for a term of years; and that by a covenant *in the said indenture, reciting that H. had purchased certain fixtures on the said pre- [*717] mises, on condition of their being repurchased as after mentioned, it was agreed between the parties, and the defendants covenanted, that immediately on the expiration or other sooner determination of the term, they, the defendants, should and would take the said fixtures, and pay such price for them to H., his executors, or assigns, as they should be appraised at by two competent persons (one to be named on each side), or by an umpire to be named by such two persons if they could not agree; that H. purchased and paid for the fixtures, and afterwards, during the term, became bankrupt, and the plaintiff was appointed his assignee; that the plaintiff declined to accept the lease, and H., within fourteen days after notice thereof, delivered up the lease and premises, pursuant to the statute, (a) to the defendants, who accepted the same, and the term granted to H. was thereby determined; that the plaintiff afterwards appointed a competent person to appraise the fixtures, and requested the defendants to do the same; but that they did not nor would, immediately on the determination of the term, accept the fixtures, and pay such price for the same as they should have been appraised at according to the covenant, but, on the contrary, would not appoint a competent person to appraise the fixtures, and neglected and refused so to do, and did not nor would pay the price or value of the same either to H., before his bankruptcy, or to the plaintiff as assignee. There was a second count, setting out a similar demise by indenture of certain premises, in that indenture mentioned, and alleging a like breach of covenant, only omitting to aver that the *plaintiff declined the lease, and stating that, after the expiration of [*718] the term, the plaintiff appointed a competent appraiser, who valued the fixtures at 108*l.*; but the defendants would not name an appraiser, nor accept the fixtures, or pay the value.

The defendants pleaded, among other pleas, the following:—1. That the bankrupt did not nor would, after the determination of the term, appoint an appraiser. 2. That the indentures mentioned in the two counts were the same and not different; that the premises in the two counts mentioned were also the same; and that before the issuing of the commission, and before notice to the defendants of an act of bankruptcy, a part of the rent in the said indenture

(a) 6 G. 4, c. 16, s. 75. See the judgment, page 726, post.

mentioned, to an amount exceeding that of the damages, became due from the plaintiff to the defendants, which rent the defendants offered to set off. 3. (To the second count.) That the plaintiff, as assignee, declined the lease pursuant to the statute, and H. the bankrupt, within fourteen days afterwards, delivered up the same, and the term thereby granted, to the defendants, whereby, and by force of the statute, the term became wholly ended and determined, and the indenture and the covenants therein wholly void, and the defendants were discharged as to all persons from liability in respect of any subsequent non-performance of the said covenants.

The first of these pleas was specially demurred to, inasmuch as it did not state that the assignees appointed no appraiser; and for other reasons. The next was also specially demurred to, on the ground, among others, that it averred the indentures and premises mentioned in both counts to be the same, whereas they clearly appeared by the declaration to be different; and also that it was *719] left uncertain which count of the declaration the plea was *intended to answer; and, further, that it offered a set-off against unliquidated damages; and on the last two grounds the Court intimated, in the course of the argument, that that plea could not be maintained; observing, however, as to the first ground stated in this demurrer, that demurring to a plea, because it alleged an indenture set out, and premises mentioned, in different counts, to be one and the same, only tended to expense, as it would drive defendants in such cases to plead a separate plea to each count, although the same answer might apply to several. To the remaining plea there was a general demurrer. Joinder in demurrer.

P. Pollock in support of the demurrers. If the assignees had the right to enforce this covenant, they, and not the bankrupt, were the persons to nominate an appraiser. And the assignees had a right to sue upon the covenant, if the bankrupt would have been entitled to do so on the determination of the lease. It appears never to have been distinctly laid down what actions may be brought by assignees in their own names upon rights accruing to the bankrupt. Rights of action for personal injuries certainly do not pass to the assignees; but on contracts it seems taken for granted in modern practice, that the right to sue does vest in them. By 5 G. 2, c. 30, s. 1, the bankrupt was bound to discover to the commissioners "all his effects and estate, real and personal," and how he had disposed of any "goods, wares, merchandises, moneys, or other estate and effects of which he was possessed, or in or to which he was any ways interested or entitled," or whereby he had "or might have or expect any profit, possibility of profit, benefit, or advantage whatsoever." The language of 6 G. 4, c. 16, s. *720] 63, describing the property of the bankrupt *which is to be conveyed by the commissioners to the assignees, is less particular, but the clause must have been meant to apply as extensively. The question upon the last as well as the first plea demurred to is, in fact, whether the bankrupt should have sued, or the assignees. [Lord TENTERDEN, C. J. Or nobody.] In *Smith v. Coffin*, 2 H. B. 444, it was held, that by the bankrupt laws then subsisting (and the same reasoning will apply to the present statute), rights of action, as well as every other beneficial interest which the bankrupt has, everything belonging to him that can be turned to profit, pass to the assignees by the assignment; and actions to enforce such rights are to be brought by them. [Lord TENTERDEN, C. J. There a right of action had clearly vested in the bankrupt at the time of the bankruptcy.] The remaining question, then, is, whether, upon the giving up of this lease, a right accrued to the benefit of the covenant for repurchase of the fixtures. Now, it was held in *Ex parte Nixon*, 1 Rose's Rep. 445, 2 Madd. Rep. 319, and *Ex parte Maundrell*, 2 Madd. 315, upon the construction of covenants to take effect at the end or other sooner determination of a term, that the refusal of assignees to accept a lease on petition (under 49 G. 3, c. 121, s. 19), was a determination of the lease within the meaning of such covenants, and that they might thereupon be enforced by the party entitled to the benefit of them. The covenant, therefore, in this case, came into operation when the lease was

delivered up, as if it had expired by lapse of time. The assignees were entitled to enforce it, and they were the proper persons both to appoint an appraiser, and to bring this action on the refusal of the defendants to perform their part of the agreement.

**Cowling, contra.* The plaintiff, having declined the lease pursuant to the statute, cannot maintain an action upon the covenants to Haviside [*721] and his assigns; nor is he in a condition to appoint an appraiser, for that was to be done by the bankrupt, or his assigns, which character, in respect of the present lease, the plaintiff has renounced. All the covenants of the lessee are put an end to by the rejection of the lease, in the same manner as they would have been by an acceptance, which was held to have that effect in *Doe dem. Cheere v. Smith*, 5 Taunt. 795. It would, indeed, be strange if the lessors continued to be bound, while, by the express words of the statute, the lessee and his assigns are discharged. *Ex parte Dixon*, 1 Rose, 445, 2 Madd. 319, and *Ex parte Maundrell*, are distinguishable from the present case. There is a great difference between the determination of a lease on petition by order of a court of equity, which is a determination by act of law and in which case the Court will see that justice is done between the parties upon the whole transaction, and a throwing up of the term at the mere will of one of the parties. Those decisions were under the statute 49 G. 3, c. 121. Before the passing of the act 6 G. 4, c. 16, assignees could not exonerate the bankrupt from the covenants by declining the lease; the only course they could take was to accept it, and then rid themselves of future liability by assigning over, *Onslow v. Corrie*, 2 Madd. 330. For this circuitous mode of discharging themselves, the new act, sect. 75, substitutes a direct one, namely, by declining the lease. But, before this act passed, the assignees, if they accepted and then assigned away the lease, were obliged to pay rent to the very day of their assigning, and not merely to the last *rent day before, *Ex parte Maundrell*. From this they are now [*722] relieved, by being enabled to get rid of the lease at once; but the legislature cannot have intended that they should, at the same time, enjoy the advantage of being exonerated from rent, and also retain the benefit of covenants in the lease as against the lessors. This would give the statute the effect not only of relieving the assignees, but of conferring on them an undue advantage. Besides, by the section last referred to, the lease, when declined, is to be given up. Now at common law, when any one has a right of action secured by a deed, to arise on subsequent events, if he give up the deed before the events happen, he cannot, when they do occur, maintain his action. There was no necessity that the assignees should bring this action. They might have kept the fixtures, if in their possession, and sold them.

But further, this is not an action which can be maintained by assignees, being for unliquidated damages.^(a) They have no right but such as is given them by the statute 6 G. 4, c. 16, and that (s. 63) only orders a conveyance to them of the personal estate, the property, and debts, of the bankrupt. The right of action here contended for does not pass with the property; the covenant is not attached to, and does not run with, the goods; and where a statute transfers an estate, it transfers with it such remedies only as by law are incident to that estate, and not collateral ones, *Bascawin v. Cook*, 1 Mod. 223. *Smith v. Coffin*, 2 H. B. 444, only shows that where a bankrupt is entitled to *property*, his assignees have all the rights which he might have had to recover it. The alleged right under this covenant does not fall within the description of a *debt. That word in the late act refers only to liquidated demands, not [*723] claims of which the value is to be ascertained by a trial. This is evident on comparing the language of the modern statute with those of the older ones, and particularly 1 Ja. 1, c. 15, s. 13. The intention of the bankrupt laws is considered by Parker, C. J., in *Miles v. Williams*, 1 P. Wms. 249, to be, "that the bankrupt, having been guilty of a fraud, should not be trusted any more with the management of his estate, but that it should be put into other hands for the

(a) As to this point, see the next case, p. 727.

safety of his creditors;" and "that, upon this intention, all those effects and debts which he could take in, or turn into money," the assignees were to have in as full a manner, by action or otherwise, in their own name. It is laid down in *Com. Dig. Bankrupt*, D. 29 (citing *Holt v. Scarrisbrig*, 2 Keb. 372, and *Drake v. The Mayor of Exeter*, 1 Ca. Ch. 71), that, after assignment, the bankrupt, and not the assignees, shall sue in covenant, because the damages are uncertain. The judgment of Buller, J., indeed, in *Smith v. Coffin*, would seem to establish that the assignees might enforce a covenant, but this is again rendered questionable by the observations of Sir W. Grant in *Wetherall v. Geering*, 12 Ves. 504. [Lord TENTERDEN, C. J. The cases previous to *Smith v. Coffin* were before the statute 5 G. 2, c. 30.] That statute does not profess to give more extensive rights of action to assignees, nor was it passed for that purpose; and, although it uses more comprehensive expressions than the preceding acts, in describing the property of the bankrupt which is to be discovered to the commissioners, those expressions are not retained in the corresponding part (sect 112) of the new act.

*724] [PARKE, J. If goods of *the bankrupt are taken, and converted before the bankruptcy, is not it the every-day practice that the assignees bring trover?] That is, in effect, an action to recover property. [PARKE, J. Suppose the property destroyed. If a ship of the bankrupt were run down, could not the assignees maintain an action for the loss?] It must be contended that they could not. But here, at least, no right of action had vested in the bankrupt. The attempt is to create it by the assignee's own act. [PARKE, J. If the bankrupt has a policy of insurance, the assignees may recover upon it for a loss happening after the bankruptcy.] In *Marsh v. Wood*, 9 B. & C. 659, the bankrupt and the defendants had submitted certain disputes between them to arbitration before the bankruptcy; and it was held, that upon that event the defendants were justified in revoking their submission, inasmuch as the bankrupt's interest in the subject-matter (which was an alleged claim of the bankrupt on the defendants in respect of loss sustained by him in a purchase of ships) had passed to the assignees, and they were not bound by the award; the submission, therefore, was no longer mutual.

The declaration is also bad, inasmuch as it does not show that the plaintiff was ready or able to let the defendants have the fixtures if they would have accepted and paid for them. (In support of this objection, he cited 2 Wms. Saunders, 352 b, and the authorities there referred to, and *Bates v. Cort*, 2 B. & C. 474.) It is not to be presumed that the fixtures remained attached to the premises. As between Havaside or his assignees, and the defendants, they became chattels by the sale of them to Havaside, according to the argument of Parker, C. B., in

*725] *Ryall v. Rolle*, 1 Atk. 165. They may, subsequently, *have been secreted or sold, and so never have come to the plaintiff's hands.

F. Pollock in reply. As to the last objection, if anything had arisen to put it out of the plaintiff's power to deliver the goods, that was matter to be alleged in defence. In *Bates v. Cort*, the defect was, that no sufficient consideration appeared for the defendant's agreement. Here no such objection could apply, the agreement being under seal. The second count states that the goods were actually valued by an appraiser for the plaintiff. (The Court, however, thought this objection important, and proposed to *Pollock* to amend; but he declined doing so.) The main point is, whether the assignee can sue on this covenant. It is clear from the modern cases, although some doubt may be thrown on this point by the older ones, that all actions, except those exclusively personal, do pass to the assignees. [Lord TENTERDEN, C. J. There is no doubt, putting it as a general proposition, that an action on a covenant does pass to assignees.] The question, then, is, whether the giving up of this lease extinguished the covenant, and made the fixtures a present to the landlord. [Lord TENTERDEN, C. J. Suppose there had been a covenant to deliver up the premises in repair, and this had been broken, against whom would the landlord have had a remedy on the delivering up of the lease?] Not against the bankrupt, by the statute; nor against the assignees. [Lord TENTERDEN, C. J. Then, according to the

plaintiff's argument, the obligations on the determining of the lease are not reciprocal: the landlord may be sued on one covenant, but cannot sue on another.] *Cur. adv. vult.*

*Lord TENTERDEN, C. J., on a subsequent day of the term, delivered the judgment of the Court. The grievance complained of in this action [*726] was, in substance, that the defendants refused to appoint an appraiser to value the fixtures. Their answer is, that the assignees, having declined the lease, cannot sue on any of the covenants. This depends on section 75 of the bankrupt act 6 G. 4, c. 16, which provides, "That any bankrupt entitled to any lease or agreement for a lease, if the assignees accept the same, shall not be liable to pay any rent accruing after the date of the commission, or to be sued in respect of any subsequent non-observance or non-performance of the conditions, covenants, or agreements therein contained; and if the assignees decline the same, shall not be liable as aforesaid, in case he deliver up such lease or agreement to the lessor or such person agreeing to grant a lease, within fourteen days after he shall have had notice that the assignees shall have declined as aforesaid." The effect of this clause is, that if the defendants, the lessors, had been desirous of purchasing the fixtures, they could not have compelled the bankrupt or his assignee to appoint an appraiser: and, as the agreement on this point is mutual, if the covenant on one side falls to the ground, it follows, that, in justice, that on the other should fail likewise. We think, therefore, that as the defendants could not have maintained an action on this covenant, the plaintiff also is precluded from suing upon it. This decides nothing as to the property in the fixtures: that question is not involved in the present decision. There must be Judgment for the defendants.

*WRIGHT v. FAIRFIELD and others, Assignees of BRACEWELL, [*727]
a Bankrupt. June 10.

Assignees under 6 G. 4, c. 16, may maintain an action for unliquidated damages which have accrued before the bankruptcy by non-performance of a contract.

ERROR from the court of great session at Chester. The declaration by the assignees, the defendants in error, stated, that the bankrupt had entered into a contract with persons acting on behalf of his majesty, to furnish stone, and execute masonry, as in the said contract was specified, for reward to him in that behalf, it being agreed, among other things, that on default made by the bankrupt in providing such stone, the other party might determine the contract: That the bankrupt, being desirous of obtaining stone for the above purpose, contracted with the defendant below (Wright) for a quantity of stone to be furnished him at a certain rate, and delivered within a specified time, upon certain terms; and that in consideration of the bankrupt's promise to perform the agreement on his part, the defendant Wright undertook, in like manner, to fulfil the same on his; that the bankrupt performed, and was ready to perform, the several matters by him promised, but the defendant below did not deliver the stone: by reason of which premises the bankrupt, before his bankruptcy, became and was unable to fulfil his contract, and lost the profits which would have resulted therefrom, to wit, 5000*l.*; and the contract was lawfully determined by the other party pursuant to the agreement; and the bankrupt also lost the advantage of a large sum of money, to wit, &c., by him laid out in the hire of workmen, and was put to great expense, to wit, &c., in endeavouring to *procure other [*728] stone; and also, by reason of the premises, other money and materials by the bankrupt expended and provided for purposes relating to the contract, became lost and useless to him. There were other counts, containing similar statements, and money counts. Plea, the general issue. Verdict for the plaintiffs below. The errors assigned were, that the declaration was not sufficient in

law to maintain the action, and that the judgment should have been for the plaintiffs in error.

Tomlinson for the plaintiffs in error. This is an action by assignees to recover unliquidated damages for the non-performance of a contract with the bankrupt, the right to those damages having fully accrued (if it accrued at all) before the bankruptcy. Such an action does not lie at the suit of assignees, although, if it had been brought in the bankrupt's name, they might have been entitled to the fruits of it. There is, indeed, some difficulty in maintaining this objection, after the intimations thrown out by the Court in *Kearsey v. Carstairs*, ante, p. 716. But the new statute, upon which the claim of the assignees is founded, must be considered as standing wholly apart from all preceding acts, and as if they had never existed, *Surtees v. Ellison*, 9 B. & C. 750. And, taken by itself, it furnishes no authority for the present action. The statute 1 Ja. 1, c. 15, s. 13, gave power to the commissioners to assign the debts due to or for the benefit of the bankrupt, and in that act it is expressly provided that such assignment "shall so vest the property, right, and interest of the said debt and debts in the person or persons of him, her, or them *729] sioners, or the greater part of them, as fully to all intents and purposes as if the said bill, bond, bonds, statutes, recognisances, judgment, or contract, whereupon the said debt or debts, deed or deeds shall arise or grow, had been made to or with, or for" the assignees: and the bankrupt, after assignment, shall not have power to recover or release such debts, but the assignees shall have the like remedy to recover the same in the names of such assignees, as the party himself might have had. The modern act, 6 G. 4, c. 16, s. 63, is less comprehensively worded; it empowers the commissioners to assign "all the present and future personal estate of such bankrupt, wheresoever the same may be found or known, and all property which he may purchase, or which may revert, descend, be devised, or bequeathed, or come to him before he shall have obtained his certificate;" and also all "debts due, or to be due" to him; and declares that such assignment "shall vest the property, right, and interest in such debts in such assignees, as fully as if the assurance whereby they are secured had been made to such assignees;" and that the bankrupt shall not recover or release the same, but the assignees shall have the like remedy to recover them in their own names as the bankrupt would have had. The language of this clause cannot be construed as extending further than to demands of a liquidated amount. This observation applies to sect. 12 of the same act. Sect. 89 provides for the bringing of actions by assignees of one partner in a firm, against any *debtor* of the partnership. If all rights of action had been intended to vest in the assignees, the provisions in this clause ought to have been more comprehensive. In 1 Ja. 1, c. 15, s. 13, it is said that the assignment shall *730] "vest the debts in the assignees, as fully as if the bill, bond, &c., or contract, whereupon the debt arises had been made to or with the assignees. That might import an intention to pass any contract, with its incidents, one of which might be an action for unliquidated damages. But the present act, sect. 63, only says, as if the *assurance*, whereby the debts are secured, had been made to the assignees. This latter expression can only refer to that kind of contract upon which a specific and ascertained debt would arise. By the act 5 G. 2, c. 30, s. 26, the estate *and effects* of the bankrupt are to be assigned as there directed. The word "effects" (if that would include demands of the nature in question) does not occur in the modern act. It may be doubted whether, even under the old statutes, the right of action on such a contract as this would have passed to assignees. For personal torts to the bankrupt, it is clear they could have maintained none, not even for words reflecting on the bankrupt in his trade, though the estate had been injured thereby. With regard to contracts, Sir William Grant, in *Weatherall v. Geering*, 12 Ves. 504, said it had never been determined that an assignee could compel a landlord specifically to perform an agreement to grant the bankrupt a lease. It will be said, that per-

sonal actions have been held to pass under the name of goods in an act of parliament, Ford and Sheldon's case, 12 Rep. 1; but that was a construction grounded on peculiar words of a statute, and in favour of the prerogative against a recusant. Ryall v. Rolle, 1 Atk. 165, 1 Ves. 348, may also be relied upon; but any general expressions to be found there as to personal actions being included in the word "goods" *in 21 Jac. 1, c. 19, the decision being only as to debts, are merely dicta. At all events that construction, with reference [731] to actions like the present, is excluded by the language of the statute 6 G. 4, c. 16, and by the mode in which the word "debts" is there employed. This case must be considered as one not provided for by the act; the remedy, if necessary, must be furnished by the legislature.

F. Pollock, contrd. This action is rightly brought by the assignees. It is clear from sect. 135 of the new act, that the legislature, in passing it, did not intend any change that should place creditors in a less favourable situation. The omission of the word "effects" in this act is of no importance; the claim in question passes to the assignees as part of the bankrupt's estate. [TAUNTON, J. "Effects" would imply something reduced into possession.] Brandon v. Pate, 2 H. B. 308, shows, that under the former statutes the right (given by 9 Ann. c. 14), to recover back money lost at play, vested in assignees as part of the bankrupt's estate. So the right to bring a real action. Smith v. Coffin, 2 H. B. 444. If, therefore, the late statute is as effectual in passing the bankrupt's estate to the assignees as the former acts were, these are direct authorities in favour of the present action. [PARKE, J. In Mitchell v. Hughes, 6 Bing. 689, the Court of Common Pleas decided, upon the sixty-fourth section of the new act, that a right of entry vested in husband and wife, in right of the wife, passes to the assignees under a commission of bankruptcy against the husband.]

LORD TENTERDEN, C. J. I have not been able to entertain any doubt upon this point. It appears to me *that the object of the act 6 G. 4, c. 16, [732] was to give the assignees, for the advantage of the creditors, every beneficial matter belonging to the bankrupt's estate. The twelfth section, which specifies what property of the bankrupt the commissioners shall have power to dispose of, uses more words than the sixty-third; it speaks particularly of "all his money, fees, offices, annuities, goods, chattels, wares, merchandise, and debts, wheresoever they may be found or known." It was, I think, intended to denote the same objects in the sixty-third section. The words there used are,— "all the present and future personal estate of such bankrupt, wheresoever the same may be found or known," and "all debts due or to be due to the bankrupt." There can be no doubt that the subject-matter of the present action comes within one or other of these descriptions: I should say that it passed under the words, "all the present and future personal estate." If it were held that a claim of this kind did not vest in the assignees, the consequence would be, that a right to damages, which would have been highly beneficial to the estate, might be released by the bankrupt.

LITTLEDALE, J. I am of opinion that the legislature in this statute intended to give assignees all the remedies in respect of the property which they were entitled to under the former acts, and that they should have power (as it appears to me they had under those statutes) to sue upon contracts made with the bankrupt and for injuries affecting his property, though not for mere personal wrongs, and such causes of action as would abate by his death. The right of action here claimed falls within the words "all the present and *future personal estate of such bankrupt." I do not think the absence of the word "effects" [733] in the present act makes any material difference. It has been the constant practice for assignees to declare in trover upon a conversion before the bankruptcy.

PARKE, J. There could be no question, or at least little doubt, as to the right of assignees under the former statutes; and, in fact, actions have been constantly maintained by assignees, for torts to the personal property of the

bankrupt, committed before the bankruptcy and rendering that property less valuable to them, as well as upon contracts made with him. I think it clear, that the framers of the sixty-third section of 6 G. 4, c. 16, meant to include in it all that could pass to assignees under the former bankrupt laws, and that the right of action here claimed passes by that clause, either as personal estate of the bankrupt, or as a debt due to him. It is true, that on a rigid construction, neither of these terms may be precisely applicable; but the statute is to be construed beneficially for creditors; and the subject-matter of this action, if not strictly a part of the estate, is something which, when recovered, will be for the benefit of the estate.

TAUNTON, J. The agreement here declared upon was one immediately affecting the bankrupt's estate. The interest he had in the contract during his solvency might be regarded as part of the estate; and I should consider the right of the assignees in respect of that interest as coming within the description of "present and future personal estate," rather than that of "debts." It is true, the damages were unliquidated; but the claim to them, when they should be *734] ascertained by verdict, was *not the less vested in the assignees. On this point there is, perhaps, no direct authority but that derived from practice; but there are cases strongly bearing on it. In *Brandon v. Pate*, 2 H. B. 308, where it was held that assignees might recover money lost at play by the bankrupt, under the statute 9 Ann. c. 14, Heath, J., and Rooke, J., considered the money to be part of the bankrupt's estate, and were therefore of opinion, that the assignees ought to sue for the recovery of it; and Heath, J., observed, that if the party himself were to recover the money, he must pay it over to the assignees. And in *Chandler v. Gardiner*, cited, 17 Ves. jun. 338, 343, it was held, that a compensation granted by the legislature to the proprietor of an ancient quay on the establishment of the West India docks, passed to the assignees on his bankruptcy. The interest was vested, and therefore passed with the estate, though the damages were not liquidated.

Judgment for the defendants in error.(a)

(a) See the observations of Sir W. D. Evans on the power of assignees to sue upon the bankrupt's rights of action, 4 Evans's Statutes, Division 2, p. 13, note. Ed. 1817.

GIBBONS v. HOOPER, Clerk.

A beneficed clergyman granted annuities by three several deeds, and (by the same deeds) made them chargeable on his living, which he thereby conveyed in trust for the grantee, for the more effectually raising and enforcing payment of the annuities out of the living: and he also gave as a security for payment of the annuities, three warrants of attorney, with defeasances in the common form, to confess judgment at the suit of the grantee.

On motion to set aside the warrants of attorney, as being a charge upon the living in evasion of the statute 13 Eliz. c. 20; the Court held that this did not appear; that the covenants in the annuity deed for payment of the annuity might be good, though the rest were void, and that payment of the arrears, under these covenants, might well be enforced by the warrants of attorney.

THE defendant had by three indentures, bearing date the 3d of January, 1818, the 13th of November, 1824, and the 1st of November, 1825, granted to *735] the *plaintiff three several annuities of 47*l.*, 74*l.* 7*s.*, and 145*l.* 7*s.* 6*d.*, chargeable upon and payable out of the rectory of the parish church of Castle Combe, in the county of Wilts, and the lands and tithes, &c., and had, by the said indentures respectively, granted, bargained, and sold to a trustee the rectory, glebe lands, tithes, &c., for certain terms, if the defendant should so long live, upon trust for the benefit of the plaintiff for more effectually raising and enforcing payment of the annuities: and there were covenants in the said indentures that it should be lawful for the plaintiff and his assigns to take the three several annuities during the defendant's life from and out of the rents,

issues, profits, tithes, &c., of the rectory, free from encumbrances. By way of collateral security for payment of the annuities, the defendant gave three warrants of attorney with defeasances in the common form, to confess judgment at the suit of the plaintiff. Judgments had been entered up on these warrants of attorney, as of Trinity term 1818, Michaelmas term 1824, and Michaelmas term 1825, and a sequestration was thereupon issued against the living. A rule nisi having been obtained for setting aside these warrants of attorney, on the ground that they were a charge on the defendant's living, and therefore void within the 13th of Eliz. c. 20, (a)

Follett now showed cause. These warrants of attorney are not contrary to the 13th of Eliz. c. 20. There is nothing on the face of them to show that they were intended to operate as a permanent charge on the benefice. This is not distinguishable from any other case of a clergyman giving a warrant of attorney as a security for a debt which he has already contracted. On *judg- [*736 ment being entered up on a warrant of attorney so given, sequestration is the ordinary consequence. *Flight v. Salter*, 1 B. & Ad. 673, is distinguishable. There the warrant of attorney recited the grant of the annuity, and the demise of the rectory, and declared that the warrant of attorney was executed to secure the annuity, and to the intent that a sequestration might be obtained by the grantee, and continued during the continuance of the annuity for better securing the same. Here the sequestration can only be for arrears of the annuity actually become due.

Campbell and Jardine, contra. This case falls within the principle of *Flight v. Salter*, and of *Kirlew v. Butts*. (b) In the latter case there was judgment

(a) See *Shaw v. Pritchard*, 10 B. & C. 241.

(b) *KIRLEW v. BUTTS* and Another.

EASTER TERM, 1831.

The defendant Butts, who was rector of the parish church of Glemsford in the county of Suffolk, and A. B., his surety, on the 12th of February, 1820, executed a warrant of attorney to confess judgment for 3000*l.*, reciting that, by an indenture of the same date, Butts, for a pecuniary consideration, had granted to the plaintiff for a term of years, determinable upon lives, an annuity of 300*l.*, charged upon and secured by a demise of the rectory; and it was thereby declared, that the plaintiff should hold the judgment upon trust to secure the said annuity, but that no execution should be issued unless the annuity should be in arrear for fourteen days; and that if, and as often as, one year's annuity should be in arrear and not paid for fourteen days after demand made thereof by notice, &c., then execution might be issued against the defendant Butts and his estate for 3000*l.*, and the sum or sums to be levied should be applied in payment of the arrears of the annuity and costs, and the surplus should be held upon trust to be laid out in the name of the plaintiff in the purchase of 3 per cent. consolidated annuities, upon trust to pay the said annuity as it should become due, and subject thereto, upon trust for the defendant Butts, and that the other defendant and his estate should still be liable for the arrears of the annuity, but no execution should be levied against him or his estate, except for the arrears of the annuity from time to time. Judgment was accordingly entered up; and in the year 1823, a year's annuity being in arrear more than fourteen days after demand made, a sequestration issued, under which the tithes and property of the living were taken by the sequestrator to an amount greatly exceeding the arrears of this annuity due at the time of the execution. A rule nisi had been obtained for setting aside the warrant of attorney, judgment, and execution, as being void by the statute 13 Eliz. c. 20.

Gurney, F. Pollock, and *W. Lee* showed cause, and relied upon *Mouys v. Leake*, 8 T. R. 411, as showing that the warrant of attorney was not void: and they distinguished the present case from *Flight v. Salter*, 1 B. & Ad. 673, in which the sequestration was to be obtained before the annuity became payable. Here it was to be a consequence of the non-payment at the appointed time.

Erskine and *Manning* supported the rule.

In the same term, Lord TENTERDEN, C. J., delivered the judgment of the Court. His Lordship, after stating the facts of the case, proceeded as follows:—

We are of opinion that the warrant of attorney and judgment ought not to be set aside, but the execution only. The effect of the provision, whereby execution, when a year's annuity shall be in arrear fourteen days after demand made, is to issue for 3000*l.*, &c., is to make the warrant of attorney an absolute charge on the benefice for the entire sum of 3000*l.*, and to give a power (if it were available by law) to take the profits of the living until the whole sum should be levied, and to apply the dividends, as far as they might go, in payment of it. We are of opinion, that by law, such a power cannot be allowed. That being so, and all the arrears of the annuity due at the time the execution issued having long since been satisfied, so much of the rule as prays that the execution may be set aside must be made absolute, and the rest discharged.

Rule accordingly.

*737] and *execution for the whole penalty. Here are several instruments executed at the same time, and for one common purpose. They must be treated in a court of law as one assurance. Whatever, therefore, affects the validity of one will affect that of all. [PARKE, J. Suppose a bond had been given for payment of the annuity, would it have been a good plea to an action *738] on such bond, that it was given to secure the annuity by means *of a sequestration?] If the warrants of attorney are held good, the object of the statute will be defeated; for the whole profits of a living may thus, by an indirect mode, be appropriated to the payment of an annuity granted by an instrument which is itself null and void under the statute. [Lord TENTERDEN, C. J. One security may be bad while the other is good.] If the deeds are void as charging the benefice, the warrants of attorney are given without any consideration. [PARKE, J. The deeds contain covenants for payment of the annuity independent of the charge on the benefice.] The words of the statute 13 Eliz. c. 20, are, "that all chargings of such benefices with cure hereafter with any pension, or with any profit out of the same to be yielded or taken, hereafter to be made, other than rents to be reserved upon leases hereafter to be made according to the meaning of this act, shall be utterly void." This is like the case of a bond given for the payment of money on an illegal contract. The one being void, they are both void. Thus a bond given as a security for payment of money on the sale of an office, which sale was void by 5 & 6 Ed. 6, c. 16, s. 3, is itself wholly void. *Lee v. Coleshill*, Cro. Eliz. 529, S. C. And. 55.

Lord TENTERDEN, C. J. I think the present case is different from those which have been referred to on the subject of charging benefices. The deeds which the plaintiff sought to enforce by means of these warrants of attorney were good as grants of annuities, though void so far as they went to charge an ecclesiastical benefice. There is nothing in the defeasances of the warrants of *739] attorney to show that they were intended to bind the *living, more than in any other case where a clergyman gives the same security. If we held these void, we must set aside every warrant of attorney given by a clergyman holding a benefice, because its effect may ultimately be a sequestration of the living.

LITTLEDALE, J., concurred.

PARKE, J. In *Mouys v. Leake*, 8 T. R. 411, which was recognised and acted upon in *Kerrison v. Cole*, 8 East, 231, it was held, that although the grant of a rent-charge on a benefice might be void, yet a personal covenant in the deed of grant to pay the rent-charge, and a warrant of attorney given as a collateral security, were not therefore invalid. The warrant of attorney in this case did not put the annuity creditor on a different footing from others, any further than as it gave him the means of more speedy execution.

TAUNTON, J. It occurred to me at first that this transaction might come within the principle of *Doe d. Mitchinson v. Carter*, 8 T. R. 300, as an attempt to do by evasion what the law would not allow to be done directly. But I think that does not apply here. The warrants of attorney were, no doubt, intended to secure the arrears of the annuity by such means as might be authorized by a judgment thereupon entered up. An execution against the living is the common and inevitable consequence of such judgment against a beneficed person; but it does not follow that the warrant of attorney is void merely because it leads to that result.

Rule discharged.

***The KING v. The Trustees of the Poor and the Vestry Clerk of the Parish of ST. MARY ABBOTTS, KENSINGTON.** [*740]

By an act for the relief of the poor of a parish, the vicar, churchwardens, and overseers for the time being, and certain persons named, were to be trustees for putting the act in execution; and a meeting was to be held every third year, to elect new trustees in the room of those who should have died, removed, become disqualified, or relinquished office; so that the number should every third year be filled up to *fifty-one, over and besides the vicar, churchwardens, and overseers* for the time being.

One of the fifty-one trustees having become churchwarden, Held; that no vacancy was created thereby.

FRENCH obtained a rule in this term, calling on the trustees of the poor and the vestry clerk of the above parish to show cause why a mandamus should not issue, commanding them to call a meeting of the trustees for the purpose of swearing and admitting, and at such meeting to swear and admit, John Johnson, as one of the fifty-one trustees of the poor of the said parish.

The affidavits in support of the rule referred to an act, 17 G. 3, c. 64, for the better relief and employment of the poor of St. Mary Abbots, Kensington, by which (after providing that the vicar, churchwardens, and overseers for the time being, and certain other persons particularly mentioned, should be trustees for putting the statute in execution), it was enacted that the vicar, churchwardens, overseers, and parishioners qualified as was after mentioned, should meet in the vestry room of the said parish on Thursday in Easter week, in every third year from and after the passing of the act, or within ten days then next ensuing (notice having been given as by the act was directed); and they, or the major part of them so assembled, should examine and inquire how many of the trustees in the act before named, or their successors, should have died, removed out of the parish, or should have refused or neglected to act for the space of two years preceding such meeting, or should appear to have become otherwise *disqualified to act in the execution of the said statute; and the said [*741 vicar, &c., were thereby authorized and required to elect and appoint by ballot one other fit and proper person, being a parishioner, qualified as therein mentioned, in the room of every such trustee so dying, removing, refusing, or neglecting to act, or having become disqualified, or of any trustee who should be desirous of relinquishing the trust and should give due notice thereof, so that the number of trustees for putting the act into execution should every third year be filled up to the number of fifty-one, over and besides the vicar, churchwardens, and overseers of the poor for the time being.

The affidavits went on to state that at a meeting holden for the purpose of filling up the list of trustees, at which John Johnson, the party making this application, attended, it was proposed that the name of Mr. Charles Chesterton should be struck out of the list of the said fifty-one trustees, and that some other person, being a parishioner, should be elected in his stead, inasmuch as he was then (as he continued at the time of swearing the affidavit) filling effectively the office of vicar's churchwarden of the said parish, and as such, was, in right of his office, entitled to act as a trustee without having his name in the list of the said fifty-one trustees, and that therefore fifteen vacancies were to be filled up, otherwise there would only be fifty trustees over and besides the churchwardens, overseers, and vicar. It was further stated in these affidavits that there were in fact, at the time of that meeting, fifteen vacancies to be filled up, including that alleged to be made by Chesterton's becoming churchwarden; and that Johnson, being duly qualified, offered himself as a candidate, was *duly elected one [*742 of the fifteen, and afterwards presented himself to the vicar and trustees and their clerk, to be sworn in, but was rejected by them.

The affidavits in answer also referred to the act of parliament, and stated, that at the meeting in question, according to the course which had been customary on such occasions, fourteen vacancies were declared as having been occasioned by death, removal from the parish, non-attendance, and relinquishment; and there-

upon fourteen persons were duly elected by ballot in the room of those who had so vacated the office, each of them having more votes than the said John Johnson, and that those persons afterwards duly qualified themselves; that at the time of the election there were fourteen, not fifteen, vacancies (Chesterton not being considered as having vacated his office of trustee); and that on former occasions (which were specified) when trustees were appointed churchwardens, no vacancy was declared on that account.

F. Pollock now showed cause, and contended that as the office and duties of trustee were clearly intended to last for life, it could not have been the meaning of the legislature that a party should be disqualified from holding that office and executing those duties, by accepting the appointment of churchwarden, which was only for a year.

French, contra, insisted upon the express provision of the act, that there should be fifty-one trustees *over and besides* the vicar, churchwardens, and overseers, and urged that this was not complied with by allowing a churchwarden to be also one of the fifty-one trustees, *unless it could be contended that one individual should count as two.

Per Curiam.(a) There was no fifteenth vacancy unless Chesterton became disqualified by taking the office of churchwarden. On looking to the whole of the act, this does not appear to be its meaning. The intention was, that there should always be fifty-one trustees, besides any who might be so merely by virtue of office. A person by becoming an official trustee does not forfeit the character of trustee which he held by previous appointment. It was evidently not considered essential that the full number of fifty-one besides the vicar, churchwardens, and overseers, should always be kept up, for if so, the elections would not have been triennial, but provision would have been made for filling up each vacancy as it occurred.

Rule discharged, but without costs.

(a) Lord TENTERDEN, C. J., LITLEDALE, PARKE, and TAUNTON, Js.

*744] *DOE dem. W. PREECE v. W. HOWELLS, J. PITTS, and T. ADDIS. June 11.

A pauper, being in custody for having left his wife and children chargeable to a parish for several years, executed an indenture, reciting "that the present, as well as former parish officers, had expended 174*l.* in maintaining his wife and children, and that he had agreed to convey to the parish officers certain lands, &c.:" and he thereby conveyed the same to trustees for the churchwardens and overseers of the poor and of the inhabitants of the parish, to the intent that the rents and profits might be applied to their use and benefit in aid of the poor rate; Held, that this was a conveyance for the benefit of a charitable use, requiring enrolment pursuant to the statute 9 G. 2, c. 36, s. 1, and not a conveyance for a "valuable consideration actually paid," within s. 2 of that act: and that a person who had been a party to the deed conveying the property, was not estopped from taking advantage of this objection.

EJECTMENT for premises in the parish of St. Owen in the city of Hereford, of which parish the defendants were, at the time when this action was brought, the churchwardens and overseers of the poor. The declaration was in the usual form, and the demise was laid on the 3d of March, in the eighth year of George IV. Plea, not guilty. At the trial before Littledale, J., at the Spring assizes for the county of Hereford 1831, the jury found a verdict for the plaintiff, subject to the opinion of this Court on the following case:—

In and for some time before May 1813, one Richard Hayes was seised of an estate for life in the premises for the recovery of which this action was brought. He left his family chargeable to the parish of St. Owen for a period of fourteen years, and that parish having disbursed for maintenance, clothes, &c., 174*l.*, and the children still being chargeable, it was resolved, at a meeting of the parishioners in vestry on the 3d of May, 1813, that a warrant should be obtained for his im-

mediate apprehension, and that it should be proposed to him to grant the parish a lease of the premises in question, towards reimbursing them a part of the expenses incurred; and that in case of his refusal, the law should be put in force against him. Hayes was accordingly apprehended for deserting his family, and *being in custody on the 12th of July, 1813, by indenture of that date [*745 between him of the one part, and William Preece, the lessor of the plaintiff, and W. Harrison, being churchwardens, and W. Phillips and J. Howells, being overseers of the poor, of the parish of St. Owen, of the other part, reciting that Hayes had some time since run away and left his wife and children, whereby they had become chargeable to the parish, and that the present and former churchwardens and overseers had expended 174*l.* from time to time in maintaining the wife and children of Hayes after he had so run away, and while he had so deserted his family; and that Hayes having been that day apprehended, and in custody for the offence aforesaid, had proposed and agreed absolutely to convey the premises to the said churchwardens and overseers for the term therein mentioned (being all the estate and property he had), in satisfaction of the said demand, on their consenting to his discharge so far as they had power and authority to do so; it was witnessed, that in consideration of the agreement, and of 10*s.*, Hayes did grant, bargain, sell, and demise to W. Preece, W. Harrison, W. Phillips, and John Howells, their executors, &c., the premises which this action of ejectment was brought to recover, to hold to them and the survivor of them, their executors, administrators, and assigns from the date thereof, for the term of sixty years, if Hayes should so long live, *in trust for the churchwardens and overseers of the poor, and inhabitants of the parish of St. Owen for the time being, to the intent that the rent and profits might be paid and applied for their use and benefit from time to time in aid of the rate for the relief of the poor.* This indenture was not enrolled. The defendants claimed title, and held possession, *under it. W. Preece, W. Harrison, and W. Phillips were alive [*746 at the time of the trial. In pursuance of a resolution of the parishioners in vestry assembled, made on the 2d of December, 1814, the premises in question were converted into a workhouse for the parish of St. Owen, and were so used, and money was laid out by the parish in repairs thereof. Afterwards (in 1826), Hayes having become seised in fee of certain premises, including those in question, conveyed the whole to the said Wm. Preece, the lessor of the plaintiff, his heirs and assigns for ever; and he, by virtue of such conveyance, entered on part of the premises, and continued in possession of that part until a short time before the ejectment was brought. The case was argued on a former day in this term.

Russell, Serjt., for the lessor of the plaintiff. The deed of the 13th of July, 1813, under which the defendants claim, is void. First, because it is inconsistent with the provisions of the stat. 5 G. 1, c. 8, which enacts, that the parish officers may, by warrant of two justices, seize so much of the goods and chattels, and receive so much of the annual rents and profits of the lands, of any person who has left his wife and children, as the said justices shall direct for and towards the discharge of the parish where such wife and children are living, but makes the churchwardens and overseers accountable to the sessions for what they receive. By proceedings like the present that check is evaded. [Lord TEN-TERDEN, C. J. The parish officers might, before the statute, have taken an assignment of the property of the husband, and there is nothing in the statute to prevent that.] Secondly, the deed was executed while Hayes was under duress. [PARKE, J. His imprisonment was lawful.] Thirdly, the *deed [*747 is void by the 9 G. 2, c. 36, s. 1, which enacts, that no land shall in any ways be conveyed to or settled on any person in trust for the benefit of any charitable uses whatsoever, unless, inter alia, it be by deed indented, and the same be enrolled in the Court of Chancery within six months; and (s. 3), that all such conveyances, otherwise made, shall be void. Now, here the lands in question were conveyed to trustees, for the parish officers for the time being, to the intent that the profits might be applied for their use and benefit in aid of the

rate for the relief of the poor. That was clearly a conveyance in trust for the benefit of a charitable use; and the deed, not having been enrolled, is void. The consideration in this case is not "a valuable consideration paid," within the meaning of the exempting clause (s. 2) of the statute.

Thesiger, contrd. The lessor of the plaintiff, being a party to this deed, is estopped from saying that it is void. Sheph. Touchstone, 53. And it appears from the case that he in fact accepted and acted upon the conveyance. [Lord TENTERDEN, C. J. Is there any authority for saying that a party is estopped from showing that a deed is void in law?](a) This was a good conveyance at common law, and is not prohibited by the 5 G. 1, c. 8, which merely gives parish officers an additional remedy. Secondly, there was no duress in this case, for that word imports imprisonment without lawful authority (Com. Dig. *Pleader*, 2 W. 19); or, compulsion by tortious usage while in prison under legal process, *748] 2 Inst. 482. Here *Hayes, at the time when he executed the conveyance, was in lawful custody by virtue of the stat. 7 Jac. 1, c. 4, s. 8. Thirdly, this is not a conveyance for the benefit of a charitable use. The statute 9 G. 2, c. 36, recites, that gifts of lands in mortmain had been prohibited or restrained by Magna Charta and other laws; but, nevertheless, this public mischief had greatly increased, by many large and improvident alienations made by dying persons or others to uses called charitable uses, to take place after their deaths, to the disherison of their lawful heirs. It is clear, therefore, that this is a case which is not within the mischief contemplated by the preamble. Indeed, the use to which the lands in question were to be applied, viz. in aid of the poor-rate, is one which the law favours rather than avoids, as appears from Porter's case, 1 Rep. 24 b, where, speaking of conveyances to inhabitants of parishes and their heirs upon trust to employ the profits to such good uses as defraying the tax of the town, maintaining the poor of the parish, &c., it is said that it would be a dishonourable thing to the law of the land to make such good uses void. Assuming it even to be within the enacting part of sect. 1 of 9 G. 2, c. 36, this is a conveyance made really and bonâ fide for a full and valuable consideration actually paid, and therefore within the proviso in sect. 2. But, assuming all or any of the objections to be good, the lessor of the plaintiff is not entitled to recover without a previous demand of possession, because the defendants were in possession by permission of the pauper, under whom the lessor of the plaintiff claims. [PARKE, J. If the deed was originally void by the statute, that will not avail.]

*749] **Russell*, Serjt., in reply. A party to a deed is estopped as to facts stated in it, but not from saying that the deed is void in law.

The consideration here, if any, was the maintenance of Hayes's family for fourteen years before the conveyance in 1813, by persons, many of whom probably were no longer inhabitants at the time of the conveyance, and could have no interest in it. *Cur. adv. vult.*

Lord TENTERDEN, C. J., now delivered the judgment of the Court.

The point reserved for our consideration was, whether the deed of the 12th of July, 1813, was rendered void by the provisions of the 9 G. 2, c. 36. We have no doubt that this is not a case within sect. 2 of that statute, which provides that the act shall not extend to any purchase of any estate, or interest in lands, tenements, or hereditaments, or any transfer of any stock, to be made really and bonâ fide for a full and valuable consideration, actually paid at or before the making such conveyance or transfer, without fraud or collusion. We think that, in order to bring a case within this section, the consideration must be paid by the person for whose benefit the conveyance is made. Here, the consideration was not paid by the persons who benefited by the conveyance, but it had been paid out of poor rates levied upon the persons who resided and paid rates in the parish, during the time when relief was given to the wife and children of Hayes. The doubt we had was, whether this was a case within the

(a) See *The Stratford Railway Company v. Stratton*, antd, p. 518: *Hill v. The Proprietors of the Manchester and Salford Waterworks*, antd, p. 544.

meaning of the first section. It certainly is not within the mischief recited in the preamble; but it evidently is within the enacting words, *for the land is conveyed in trust for the benefit of a charitable use, to the intent that the rents and profits may be applied to the use and benefit of the poor in aid of the poor rate. This deed, therefore, not having been enrolled, is void, and consequently, the plaintiff is entitled to recover. Judgment for the plaintiff. [*750]

The KING v. WILLIAM ASHTON.

An indictment on the statute 7 & 8 G. 4, c. 30, s. 3, for feloniously damaging warps of linen yarn, with intent to destroy or render them useless, need not allege that the warps, at the time of the damage done, were prepared for or employed in carding, spinning, weaving, &c., or otherwise manufacturing or preparing any goods or article of silk, woollen, linen, &c.

INDICTMENT stated that William Ashton, on, &c., at, &c., divers, to wit, six warps of linen yarn of the value of 6*l.*, and six other warps of linen of the value of 6*l.*, of the goods and chattels of Edward Jackson and others, then and there being found, unlawfully, maliciously, and feloniously did damage by throwing the said warps of linen yarn and the said warps of linen with great force and violence unto and upon the ground there, and then and there unlawfully, maliciously, and feloniously tearing, cutting, dragging, and throwing about the same, with intent then and there feloniously to render the same useless, against the form of the statute, &c. The defendant having been convicted upon this indictment at the Spring assizes for the county of York 1830, a writ of error was brought, and the errors assigned were, that it did not appear by the count on which the conviction took place, that the said warps were, at the time of the damage, as therein stated, goods in any stage, process, or progress of manufacture, within the act, or that they were prepared for being woven or manufactured into, or were employed in the *weaving or manufacturing of any such goods as were mentioned in the first part of the section of the act upon which the indictment was framed; or that they were in or upon any loom or machinery used for preparing or manufacturing the same, or were in any way connected with such machinery after having been so prepared, or that they were in any house or place used for carrying on such manufacture, or that they were prepared for, or undergoing or being in any stage, process, or progress of manufacture. The case was argued this term, by [*751]

Cottingham, in support of the writ of error. The indictment does not state any offence against the 7 & 8 G. 4, c. 30, s. 3; (a) because, by that statute, the damaging, with intent to render useless, any warps of linen, is made an offence in cases only where such warps have been prepared for or employed in spinning, weaving, or otherwise manufacturing the goods *mentioned in the previous part of the section. Here the indictment does not allege that the warps of linen were so prepared or employed. The third section of the statute consists of three branches. The first makes it an offence maliciously to damage with intent to destroy or render useless goods being in the loom, or in any stage, progress, or process of manufacture. The second branch makes it [*752]

(a) By that section it is enacted, "that if any person shall unlawfully and maliciously cut, break, or destroy, or damage with intent to destroy, or to render useless, any goods or article of silk, woollen, linen, or cotton, or of any one or more of those materials mixed with each other, or mixed with any other material, or any framework-knitted piece, stocking, hose, or lace respectively, being in the loom or frame, or on any machine or engine, or on the rack or tenters, or in any stage, process, or progress of manufacture: or shall unlawfully and maliciously cut, break, or destroy, or damage with intent to destroy, or to render useless, any warp or shute of silk, woollen, linen, or cotton, or of any one or more of those materials mixed with each other, or mixed with any other material, or any loom, frame, machine, engine, rack, tackle, or implement, whether fixed or movable, prepared for or employed in carding, spinning, throwing, weaving, fulling, shearing, or otherwise manufacturing or preparing any such goods or articles; or shall by force enter into any house, shop, building, or place with intent to commit any of the offences aforesaid, every such offender shall be guilty of felony," &c.

an offence to damage with intent to destroy or render useless any warp of linen, &c., or any loom, frame, machine, engine, rack, tackle, or implement, whether fixed or movable, "*prepared for or employed in carding, spinning, throwing, weaving, fulling, shearing, or otherwise manufacturing or preparing any such goods or articles;*" and the third branch, which does not apply to this case, renders it penal to enter into any house with intent to commit any of the offences aforesaid. It is, therefore, a felony under the first part of this section, to destroy the goods while in a course of manufacture; and under the second, to destroy the warps or machinery while employed in manufacturing. A warp consists of many hundred lines of silk, cotton, or yarn, stretched horizontally on the weaver's beam, ready to receive other lines of the same article, which the weaver throws across such lines, and thereby forms the cloth, &c. While in this state, it must be considered as a part of the machinery used in the manufacturing. And, according to the true grammatical construction of the second branch of the section, the words "*prepared for or employed in carding,*" &c., apply to all the preceding words, including "warps." Even if it were doubtful on the language of the act itself, that would appear to be the true construction by reference to former statutes, now repealed, on the same or the like subject-matter. That which bears *most upon the present case is the 22 G. 3, *753] c. 40, s. 3, (a) which made it an offence "wilfully and maliciously to cut or destroy any linen or cotton, &c., in the loom, or any warp or shute, tools, tackle, and utensils prepared for or employed in the making thereof." Now the warp cannot be said to be prepared for manufacturing until it is on the weaver's beam, in the situation which admits of the weft being introduced. For anything that appears in this indictment, the tackle in question might have been lying loose in the highway. In prosecutions upon statutes of this nature, the strictest proof is necessary that the article was in the place or situation pointed out by the act; Hugill's case, 2 Russ. on Crimes, 245, 2d ed., *Rex v. Dixon*, Russ. & Ry. 53; and the averments on the record ought to be equally precise.

Wightman, contra. The only question is, whether the words "prepared for or employed in carding," &c., apply to two preceding parts of the sentence, beginning "or shall unlawfully and maliciously cut," &c., or to the last only? If the meaning be doubtful, the Court will look to acts of parliament in *pari materia*. There are three distinct subject-matters of offence contemplated by the clause in question. First, the destroying or damaging of goods, being in the loom, or in any stage, process, or progress of manufacture. There the words "being in the loom," &c., qualify the preceding words. Secondly, the destroying or damaging of any warp, shute of silk, &c. There no qualification *754] whatever is given; nor was any required, for the term "warp" *sufficiently explains itself, without the addition of the words "prepared for or employed in manufacturing," &c. The third is damaging or destroying any loom, &c., prepared for or employed in manufacturing goods, and there the latter words are a qualification of the preceding. There, as in the first clause, a qualification was necessary to limit the enactment to the mischief contemplated by the statute. That this is the true construction of the act appears by referring to the preceding statute, 4 G. 4, c. 46, which repeals the 22 G. 3, c. 40. The act 4 G. 4, c. 46, makes it an offence to enter by force into any house, shop, or building, with intent to destroy or damage in the loom or frame, &c., or in any stage, process, or progress of manufacture, any woollen, silk, linen, or cotton goods, &c. "*or to cut, break, destroy, or damage any warp or shute of woollen, silk, linen, or cotton, &c., or of any one or more of those materials mixed with each other, or mixed with any other material or any framework knitted piece, stocking, hose, or lace; or to burn, break, cut, destroy, or damage any loom, frame, machine, &c., whether fixed or movable, prepared for or employed in carding, &c., or otherwise manufacturing or preparing any such goods or articles.*" There it is quite clear that the words, "prepared for or employed in carding,"

(a) He also referred to 12 G. 1, c. 34, s. 7. 4 G. 3, c. 37, s. 16. 6 G. 3, c. 29, s. 15.

&c., apply to the latter branch only of the sentence, and not to that branch which mentions a warp or shute of woollen, silk, &c.; and it may be inferred that the clause now in question was intended to have the same effect.

Cur. adv. vult.

Lord TENTERDEN, C. J., now delivered the judgment of the Court.

*We are of opinion, on a careful examination of the statute, that it was not necessary to allege specifically in the count that the warps therein mentioned were prepared for or employed in *carding, spinning, weaving, &c., or otherwise manufacturing goods*. The third section of the 7 & 8 G. 4, c. 30, consists of three branches. The first branch enacts, that if any person shall unlawfully and maliciously damage, with intent to destroy, any goods therein described, being in the loom, &c., he shall be guilty of felony. Now in an indictment for an offence against that enactment, it would be undoubtedly necessary to allege that the goods were at the time of the damage on the loom, &c., because it was not the intention of the legislature to make it an offence to destroy such goods wherever found, but to protect them only while they were in a course of manufacture. The same observation applies to the latter part of the second branch of the section, which makes it an offence to damage or break any loom prepared for or employed in manufacturing, &c.: it would not be sufficient in an indictment, framed upon that provision of the statute, to charge the mere destruction of a loom, without adding that it was one prepared or employed in some of the ways therein described, for the count then would be too general. But as to the damaging of any warp or shute of silk, woollen, or linen, the question may, on the words of the act, admit of some doubt. The whole sentence is, "If any person shall unlawfully and maliciously damage, &c., with intent to destroy, any warp or shute of silk, woollen, linen, &c., or any loom, frame, &c., prepared for or employed in carding, spinning, weaving," &c.; and the question is, if the words "prepared for or employed," &c., are to be considered as referring to all the preceding words, or to those only *denoting the implements of manufacture. That must be ascertained by looking at the subject-matter of the enactment and the object which the legislature had in view. That object in the first branch of the section was, the protection of goods while in the course of manufacture; in the second, the protection of the warp or shute, and of the machinery and implements, when they were prepared for or employed in the production of goods. Now, as to the latter, it is necessary, with a view to the limited purpose which the legislature had in view, that the concluding words should apply to them; but not so as to the warp, because a warp is a denomination of some kind of thread prepared to be woven and used in manufacture; it is in itself something "prepared for manufacturing goods." We were referred in the argument to former acts of parliament in *pari materia* which had been repealed, and it was said that, under some of those acts, the word warp was so connected with the words importing preparation for manufacture, that a similar connexion must be understood here, and, consequently, it was necessary that they should be so connected in an indictment on the present clause. To the party indicted that must, at all events, be immaterial, because the warp must be something already prepared for manufacture; and therefore the proof would be the same whether the indictment contained such an allegation or not; but in the statute 4 G. 4, c. 46, the word warp is used absolutely, by itself, without reference to any word denoting preparation for manufacture, and without any qualification before or after. The words which follow, "or to burn, break, &c., any loom, &c., prepared for or employed in manufacturing," constitute a distinct branch of the sentence, and after them a new sentence commences. Upon this view of the two *acts of parliament, and considering that the word warp is a well-known denomination of an article which is in some way or other prepared for or employed in manufacture, we are of opinion that it was not necessary to allege specifically in this case that the warp mentioned in the indictment was so prepared or employed.

Judgment affirmed.

NOVELLI v. ROSSI. *June 10.*

Defendant, in discharge of a debt to plaintiff, endorsed bills to him, which had been drawn and endorsed to the defendant by parties in France, but were accepted by a person in this country, and payable at a banker's here. Plaintiff endorsed them over. On their being presented for payment, the banker's clerk inadvertently cancelled the acceptances, but immediately wrote opposite to them, "cancelled by mistake;" and the bills were not however paid, there being no effects. The holders then presented them at a house to which they were addressed in case of need, but that house refused payment in consequence of the cancelling; they would otherwise have honoured them. A re-acceptance was obtained from the acceptor, but he did not pay the bills. The plaintiff then took them up and returned them, regularly protested, to the defendant, who applied to the prior endorsers for payment, but they refused.

The defendant, who resided abroad, cited the drawers, the intermediate endorsers, and the plaintiff, before the tribunal of commerce at Lyons, for the purpose of obtaining a guarantee for himself against liability on the bills. That court adjudged him and the other parties, except the plaintiff, discharged from liability, and decreed that the bills should remain to the plaintiff's debit. The plaintiff then carried the cause to a court of appeal in France, which confirmed this decree, assigning as a reason that the cancelling of the acceptances operated as a suspension of legal remedies against the acceptor, and was equivalent to a delay granted him by the holders, with whom the plaintiff was identified, and, consequently, that the other parties to the bills were discharged.

Held, that the French courts had mistaken the law of England as to the effect of the cancellation; and, therefore, that the defendant was still liable at the plaintiff's suit for the debt in respect of which the bills were given, notwithstanding the decree.

ASSUMPSIT against the defendant and Louis Gariel (who was outlawed in this action), for 613*l.* claimed to be due to the plaintiff on the balance of his account with the defendant. Plea, the general issue. At the trial before Lord Tenterden, C. J., at the London sittings after Hilary term 1830, a verdict was found for the plaintiff for 613*l.*, subject to the opinion of this Court upon the following case:—

The plaintiff was a foreign merchant living at Manchester, and agent there *758] for the defendant and his partner, *Gariel, who resided, and carried on business as merchants, at Turin. In October 1825, the defendant, being at Manchester, endorsed and delivered to the plaintiff, in payment for goods, two bills of exchange, dated Lyons, 20th of October, 1825, for 300*l.* and 200*l.* sterling, drawn by Bodin, Freres and Co., merchants at Lyons, upon John Marshall, Friday Street, London, payable at three months to the order of the drawers.

At the time of drawing the bills, Bodin and Co. had written on each of them an address to Messrs. Heath, Son, and Furze, in case of need. These latter parties resided in London, and were correspondents of Bodin and Co. The bills had been specially endorsed and delivered by Bodin and Co. to Quizard and Co. of Lyons; they endorsed them over to the defendant and Gariel, and the defendant, by procuration for Gariel, endorsed and delivered them to the plaintiff at Manchester as before mentioned. The plaintiff presented the bills in due course to Marshall, the drawee, who accepted them, payable at the house of Messrs. Glyn and Co. The plaintiff then wrote on the bills an address to Messrs. Gandolfi and Co. in case of need, and endorsed and paid them away. One of the bills came to the hands of Messrs. Jones, Lloyd and Co., bankers, London, the other to those of Messrs. Dorrien, Magens and Co., also bankers in London.

On the 23d of January, 1826, when the bills became due, they were presented by their respective holders to Glyn and Co. for payment, and were respectively marked by a clerk in the banking-house of Glyn and Co. through the acceptances; but immediately afterwards a memorandum was written by him in the margin of each in these terms, "cancelled by mistake;" and the bills *759] were then *returned to the holders unpaid. It is usual for a person who cancels a bill by mistake, to write on it. Marshall, the acceptor, had no effects in the hands of Glyn and Co. The bills were then presented to Heath, Son, and Furze for payment, who refused, alleging "that they could not interfere, the acceptance being cancelled." One of the partners, who was called, said that they would certainly have paid the bills, but that the cancellation was

an irregularity, and they should have required an authority; and the parts of the bills presented to them had not any re-acceptance. Glyn and Co. afterwards obtained the re-acceptance of the bills from John Marshall, and the latter, being applied to for payment, answered, "that as to the bill for 300*l.*, he could not pay it at present; and as to the other bill for 200*l.*, he would pay it to-morrow."

The bills were afterwards, on the same 23d of January, protested and returned to the plaintiff, who took them up, and having given the defendant due notice of the dishonour, sent them with the protests to Gariel and Co., who sent them back to the prior endorers, Quizard and Co.; and they applied to Bodin Freres and Co., the drawers, for payment, which was refused.

In March 1826, Gariel cited before the Tribunal of Commerce at Lyons, Bodin Freres and Co., Quizard and Co., and the present plaintiff, to show cause as follows: Bodin Freres and Co., why they should not be compelled to put a stop to all demands on the part of the present plaintiff as far as regarded the said bills; or, if not, be condemned to reimburse the present plaintiff, in discharge of Gariel, the amount of the said bills with interest and the costs; and the present plaintiff, to show cause why, in case the protests should be declared *irregular, he should not be compelled to become guarantee for Gariel, and cause to cease all opposition on the part of Bodin Freres and Co., and Quizard and Co., under pain of being declared to have forfeited all claim upon Gariel. The plaintiff appeared to the citation. [*760]

The tribunal decided, without any regard to certain exceptions taken by Novelli and Gariel, in which they were pronounced not to have any good ground, and on which they were declared nonsuited, that Bodin Brothers and Co., Quizard and Co., and Gariel, were released from all demands; consequently, that the bills in question would remain to Novelli's debit, who was cast in the costs of all parties. And they assigned among other grounds for this decision, that there were no satisfactory reasons for supposing that the laws of England, conformably with those of France, did not oblige the holders of bills of exchange to present them to the persons indicated in case of need; and that, besides, it appeared from the declaration on the protests, that the aforesaid persons would have paid if the acceptance had not been cancelled; and that, in consequence of this very cancelling, Bodin and Co. had sustained an injury.

The present plaintiff appealed from this decision to the Cour Royale at Lyons, and prayed (as he had already done before the inferior court), that Gariel, Quizard and Co., and Bodin and Co., might be condemned to reimburse him the amount of the bills with interest and costs. He also desired to be admitted to prove, that, by the English law, the holder is not under a necessity of applying to the party to whom a bill is addressed in case of need; and that, by the same law, the erasure of an acceptance only takes effect when it has been the result of an understanding with the holder.

*Gariel also prayed that in case the Court should amend that part of the former sentence by which the bills were ordered to remain for Novelli's account, Quizard and Co. and Bodin and Co. might be condemned to guaranty him, Gariel, from any decision that might be made against him in favour of Novelli. Quizard and Co. in like manner prayed that Bodin and Co. might be compelled to guaranty them in case the sentence should be amended, and Bodin and Co. prayed that the appeal might be quashed. [*761]

The Cour Royale pronounced a decree, quashing the appeal and ratifying the former sentence. They stated, as grounds of their decision, several considerations resulting from the facts as represented to them: and, particularly, that as the bills had come into the hands of the last holders duly accepted, and as it appeared that when the protests were made the acceptances had been cancelled (on which account the bills were dishonoured by the parties named in case of need), and that the re-acceptance was subsequent to the protests, it followed that the bills had been vitiated in the hands of the last holders, since Marshall, the acceptor, could no longer be considered as "the direct, and in solidum debtor,"

and, therefore, every action against him must be suspended till it was ascertained that he possessed funds belonging to the drawers sufficient to discharge the bills: whereas, if the cancelling had not taken place, proceedings could, and probably would, in the then state of commercial affairs in London (January 1826), have been adopted against Marshall immediately on the dishonour. The Court went on to observe, "that the cancelling of the acceptances throwing an
*762] obstacle in the way, this extraordinary change in the state of the bills *was evidently to Heath, Son, and Furze, and also to Gandolfi and Co., a reasonable ground for refusing to reimburse the holders, by honouring the signature of the drawers and of one of the endorsers, whose intermediate agents they only were to effect the payment, but solely in case that the holders had preserved the right to exact it." And the Court was of opinion, that the cancelling, whether accidental or otherwise, operated in the same manner as a granting of time to the acceptor by the holders; and thus, on general principles of law, precluded them from any remedy against the endorsers or drawers. The Cour Royale also stated, that they considered the circumstances as leading to a presumption, that the holders had in reality been paid the amount of the bills by Glyn and Co., and that the supposed accidental cancelling was a contrivance among the parties in London, in consequence of Marshall's insolvency, to make Bodin and Co. answerable for the bills, instead of subjecting Glyn and Co. to the loss of their amount. But, at all events, they relied on the consideration before stated (the legal effect, namely, of the alteration in the acceptances), as sufficient ground for their decree.

They finally declared, that they had no regard to the proofs offered by Novelli, for which they pronounced him nonsuited, and assigned as reasons: That the whole transaction in London "was totally unconnected with Novelli, who resides at Manchester, and was only an intermediate endorser, and who, nevertheless, has found himself a principal party in the process before the Court; but that Novelli has to impute to himself the having voluntarily yielded to the action carried on by the endorsers against himself; and that, with respect to Bodin
*763] Freres and Co., the act of the holders in London, who *were his mediate or immediate agents, is now necessarily common to himself, and thus he no longer possesses any rights beyond those of the holders themselves; and that, consequently, the proof offered by him, not being contradictory to any of the facts that have been established in the process, must be considered as wholly irrelevant and inadmissible."

An appeal lies from the Cour Royale at Lyons, to the Cour de Cassation at Paris, which is in the nature of a court of error, but it did not appear that any appeal was ever lodged there against the above decree.

Under these circumstances, if the defendant's liability to the plaintiff on the bills was to be considered as not discharged, the verdict was to stand for 613*l.*; otherwise a nonsuit to be entered.

Coltman for the plaintiff. The foreign judgment is no bar to the plaintiff's right to recover in this action. The Court here may examine into the validity of such judgment, and is not bound by it if it appear to have been erroneous. In this case the French Court has assumed, as a ground of its decision, that in England the cancelling of an acceptance by mistake, and by a person having no authority, operates against the holders of the bill in the same manner as if they had given time to the acceptor, and precludes them from recovering against prior endorsers or the drawers. That is clearly a misconception of the English law. Here the Court called upon

F. Pollock for the defendant. It is not at all clear that the Cour Royale was
*764] mistaken as to the English *law. The defendant here says, in answer to the plaintiff's claim, that he has endorsed two bills to the plaintiff for the value, and is not to blame if they have proved unproductive. But for the cancelling, Heath & Co. would have paid them. It is said, that a cancelling by mere mistake and without authority is by the English law of no effect, and *Raper v. Birkbeck*, 15 East, 17, may be cited as an authority to that purpose;

but there Lord Ellenborough seems to admit, that if the endorsers had shown, in point of fact, that after paying the bill, they would have been subjected to any difficulty in recovering over, by reason of the cancellation, the question as to their liability would have been different. It may be true, that such an accident makes no difference in the rights of the holder of the bill, as against the acceptor; but in the case of an intermediate party it may well be questioned, whether, if such person would be unjustly exposed to the risk of injury by paying the bill, he is, under such circumstances, obliged to do so. If Heath & Co. had taken up these bills, the state of the acceptances would evidently have been a material obstacle to their recovering against Bodin. Besides, the judgment of the Cour Royale is in part founded on a conclusion of fact, which they were at liberty to form from the statements before them, that the bills had actually been paid. They are a court of competent jurisdiction, and have decided the question between these parties.

Lord TENTERDEN, C. J. It is unfortunate for the defendant, if the law of England compels him to pay *this debt, while the sentence of the French Court, confirmed on appeal, prevents his recovering the amount from the [765
endorsers and drawers of the bills abroad. But this is the consequence of his own act. Without waiting to ascertain what the judgment of an English Court would be in a proceeding on these bills, he goes at once for relief before a court in France, where the law of England is misinterpreted, it being considered there that the remedy upon the bills in this country was suspended by the accidental cancelling of the acceptance, and, consequently, the endorsers and drawers discharged. If the defendant had waited the result of an action here, the decision of the French Court would then probably have been different. If there is no person in this country from whom the defendant can recover what he is liable to pay in this action, that is certainly a misfortune, but it is one that he has brought upon himself. The verdict for the plaintiff must stand. (a)

(a) The above case may be added to several others which qualify the rule laid down by De Grey, C. J., in the Duchess of Kingston's case, 20 Howell's State Trials, 538 (see also Bull. N. P. 244, and Philips v. Hunter, 2 H. Bla. 402, judgment of Eyre, C. J.), "that the judgment of a court of concurrent jurisdiction, directly upon the point, is as a plea, a bar, or, as evidence, conclusive between the same parties, upon the same matter directly in question in another court." See, as to this point, 1 Phillips on Evidence, Part II., Chapters 2 & 3, and Starkie on Evidence, Part II., sects. 67, 68; and Frankland v. M'Gusty, 1 Knapp's Rep. (Privy Council), 274: and, with reference to the present case particularly, the concluding dictum of Lord Ellenborough in Buchanan v. Rucker, 1 Camp. 63. Perhaps, too, a question might have been raised in this case, whether or not the judgment in France was final and conclusive there; if not, it could not have been taken advantage of in this action. Plummer v. Woodburn, 4 B. & C. 625. The objection (also taken in Raper v. Birkbeck, 15 East, 17), that the accidental cancellation placed the endorser in a worse situation in respect of his remedy against prior endorsers, was relied upon, but answered by the Court, in Wilkinson v. Johnson, 3 B. & C. 428. In the present instance, however, the defendant's remedy against the prior endorsers abroad was not merely impeded, but, as it seems, wholly taken away; which affords some ground of distinction between this and the last-mentioned case.

*In the Matter of ———, Gent., one, &c.

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A motion to strike an attorney off the roll on the ground of misconduct, and the want of regular service, in his clerkship, comes too late when the party has been three years and a half admitted.

CAMPBELL moved for a rule to show cause why an attorney should not be struck off the roll, upon the following statement:—The party served three years as articled clerk to an attorney at Liverpool. His articles were then assigned to another attorney, also practising at Liverpool, who immediately afterwards left that town, and went to reside at a place fifty miles distant, where, from thenceforth, he exclusively practised. His name, however, continued on the door of

his former house at Liverpool, and the person against whom this application was made resided and carried on business there, solely on his own account, till the expiration of his articles. He was admitted an attorney in January 1828, and from that time carried on the business as before, only substituting his own name on the door of the office for that of the attorney who had removed. His admission was not opposed, nor did it appear when the misconduct now alleged became known to the party making this application. *Campbell* adverted to the case *Ex parte Page*, 1 Bingh. 160, where an application of this kind, grounded on irregularities previous to admission, was rejected by the Court of Common Pleas; but he observed, that the admission there was contested at the time before a Judge at chambers, and he thought the opposition malicious; which distinguished that case from the present.

Per Curiam. The facts now stated would have been a ground for opposing the admission, or for an application like the present, if made very shortly, as a month or two, or a term or two, after the admission. But this motion comes too late. Rule refused.

*767]

*CANE v. LOVELACE. June 11.

A. having agreed with B. to advance him a sum of money, and to pay off an annuity formerly granted by him, B. executed a deed, whereby, in consideration of 1050*l.*, he covenanted to pay an annuity to A., and assigned to him certain dividends upon trusts for the purpose of securing the annuity. The 1050*l.* were paid to B. the grantor, who directly returned to the grantee the sum necessary for paying off the annuity; and he immediately paid it over for that purpose. In the memorial enrolled pursuant to 53 G. 3, c. 141, the consideration for the present annuity was stated to be 1050*l.*, without any notice of the former annuity: Held, that this statement was sufficient.

Held, also, that it was not necessary to notice in the memorial, a covenant in the annuity deed, that if the grantor went abroad, whereby the expense of insuring his life should be increased, the grantee might retain such additional amount out of the dividends; and, if they proved insufficient, the grantor should make up what was wanting.

Under the head "Nature of the Instrument" in the memorial, the deed was described as an "Assignment of dividends, and annuity deed to secure the same." Held, that this was not so incorrect as to invalidate the memorial.

CAMPBELL had obtained a rule calling upon the plaintiff to show cause why an annuity deed executed by the defendant to the plaintiff, and a warrant of attorney given for securing the annuity, should not be set aside, on the grounds, among others, that the memorial enrolled did not truly or sufficiently state the consideration; that it did not state or notice a certain covenant and trust, contained in the annuity deed, for payment of extra expenses of insurance; and that it did not truly express the nature of the deed.

It appeared on the affidavits, that the defendant had formerly granted a redeemable annuity to one Nelly Preedy, and for securing the same had assigned a moiety of the dividends on 8264*l.* 3 per cent. consolidated bank annuities, to which the defendant was entitled for his life. The plaintiff afterwards agreed with the defendant to pay off Mrs. Preedy's annuity on its being assigned to him, and to make a further advance to the defendant; and in pursuance of that agreement the annuity deed now in question was executed on the 22d of December, 1817. By that deed, after reciting that the plaintiff had contracted with the defendant to purchase of him an annuity of 124*l.* a year for the defendant's

*768] life at 1050*l.*, *to be secured out of the interest and dividends to which the defendant was entitled from the said sum of 8264*l.*, and otherwise as was after mentioned, and reciting also a warrant of attorney given for further security; it was witnessed, that in consideration of 1050*l.* by the plaintiff to the defendant in hand paid at the execution of the indenture, the defendant covenanted to pay the annuity, and assigned to the plaintiff his, the defendant's moiety in the said dividends, &c., to hold to him, his executors, &c., upon certain trusts, having for their object the securing payment of the annuity, and all costs and charges.

The deed contained a covenant by the defendant that, in case he should at any time leave Great Britain or Ireland, whereby the plaintiff might be put to extraordinary expense in insuring the defendant's life, it should be lawful for the defendant from time to time to retain, out of the surplus moneys arising from the interest and dividends assigned by that deed, sufficient to cover the amount of such extraordinary expenses, and that in default of trust money adequate to that purpose, the deficiency should be made up, on demand, by the defendant. The deed contained no notice of Mrs. Preedy's annuity. It appeared, however, that the defendant, as soon as he received the 1050*l.* from the plaintiff, handed to him the requisite sum for the redemption of that annuity, according to the previous agreement, and the plaintiff immediately paid it over to Mrs. Preedy. In the memorial, under the head "Nature of the Instrument," were inserted the words "Assignment of dividends and annuity deed to secure the same." The consideration was stated to have been 1050*l.*, paid in Bank of England notes.

**F. Pollock* and *Rogers* now showed cause. With respect to the covenant in case of the grantor's going abroad, it was held in *Wood v. Perrott*, 5 B. Moore, 63, which was a case under the present annuity act, 53 G. 3, c. 141, that such a covenant need not be inserted in the memorial. If it be contended that the redemption of Mrs. Preedy's annuity was part of the consideration, and ought to have been stated, a reference to the words of the schedule, consideration, and "how paid," will show that an understanding of this kind, as to something which was to be done after payment of the 1050*l.*, cannot be within the meaning of the act. *Yems v. Smith*, 3 B. & A. 206, is an authority for this construction. And if it could be said that the payment by the grantee, of a sum, part of the 1050*l.*, in redemption of Mrs. Preedy's annuity, formed part of the consideration, it appears, from *Ex parte Fallon*, 5 T. R. 283, that this payment to the grantor's use, might be regarded as part of the payment of 1050*l.* to the grantor; it would not, therefore, under the present act, require a distinct mention. The statements in a memorial ought to be construed, not with legal subtlety, but according to common and popular understanding. *Craufurd v. Phillips*, 2 New Rep. 141; *Defaria v. Sturt*, 2 Taunt. 225; *Butler v. Capel*, 2 B. & C. 251; *Crowther v. Wentworth*, 6 B. & C. 366. [*769]

Campbell and *Manning*, *contrd.* The covenant in *Wood v. Perrott*, 5 B. Moore, 63, was differently expressed from that now in question. In *Cummins v. Isaac*, 8 T. R. 183, the omission of a covenant like the present was considered a fatal defect in the memorial. *Chawner v. Whaley*, 3 East, 500, is a similar case. [LITTLEDALE, J. Those were under the former statute, 17 G. 3, c. 26. PARKE, J. Some of the cases under that act were decided without sufficient reference to the words of the statute.(a) If the grantor of an annuity covenants to insure his life, is the premium to be inserted in the memorial? And under what head, within the provisions of the present act? The premium is no part of the annuity or rent-charge.] Such a covenant would not be within the letter of the act: but the payment here provided for might be considered as coming under the head "Amount of annuity." It would be, according to the statute, "an annual sum to be paid" by the grantor to the grantee. [PARKE, J. It is subject to a double contingency.] Then, the description in this memorial, "Assignment of dividends and annuity deed to secure the same," is clearly erroneous; and such an error, though it were only a clerical one, is fatal. *Nash v. Godmond*, 1 B. & Ad. 634. And the consideration, though it was nominally a payment of 1050*l.*, as stated in the memorial, is shown to have been a payment of part only of that sum, and the redemption of a former annuity. On this ground, also, the memorial is invalid. *Washburn v. Birch*, 5 T. R. 472. [PARKE, J. There the whole transaction was between the parties to the deed. The former annuity was to be given up by the grantee of the latter. Here, as between the parties, the consideration was 1050*l.*; no matter what was to be done

(a) See the observations of *Chambre, J.*, in *Defaria v. Sturt*, 2 Taunt. 225, and *Parke, J.*, in *Wood v. Perrott*, 5 B. Moore, 63.

*771] with it afterwards. You confound the *purpose with the consideration.]
In this case they are not distinguishable.

LITTLEDALE, J.(a) I am of opinion that this rule must be discharged. It appears to me that, as between these parties, the consideration for the annuity was the payment of 1050*l.* by the grantor to the grantee, although that payment was immediately followed by a transfer of part of the sum to the holder of a former annuity, which was then put an end to. I do not think it was requisite that the stipulation with respect to insurance should have been noticed in the memorial: the payment of it was contingent; it was no part of the "annuity or rent-charge;" it was, in fact, a provision for securing payment of the annuity. *Wood v. Perrott*, 5 B. Moore, 63, is a strong authority in favour of the plaintiff. The cases cited in opposition to this were under the former statute (17 G. 3, c. 26), which required a greater particularity of statement than the act now in force. As to the terms in which the nature of the instrument is described, I think they are sufficiently correct.

PARKE, J. I am of the same opinion. The nature and effect of the instrument are described, if not quite accurately, yet with as much particularity as the present statute requires, giving it the same latitude of construction as was used in *Butler v. Capel*, 2 B. C. 251, and *Crowther v. Wentworth*, 6 B. & C. 366. The rule must be discharged.

TAUNTON, J., concurred.

Rule discharged.

(a) Lord TENNYSON, C. J., was not present at the decision of this case.

*772] *LETHBRIDGE and Another v. MYTTON. June 13.

Defendant, by a settlement made on his marriage, conveyed estates upon certain trusts, and covenanted with the trustees to pay off encumbrances on the estates, to the amount of 19,000*l.* within a year: Held, that on his failing to do so, the trustees were entitled to recover the whole 19,000*l.* in an action of covenant, though no special damage was laid or proved; and an inquiry, on which nominal damages had been given, was set aside, and a new writ of inquiry awarded.

THIS was an action of covenant brought against the defendant by the trustees of his marriage settlement. The settlement was executed in 1821; the wife's portion was mentioned in the recital as part of the consideration, and certain estates of the defendant were then conveyed to the plaintiffs upon the usual trusts of a marriage settlement, subject to mortgage encumbrances amounting to about 19,000*l.* These the defendant covenanted to pay off within twelve months from the marriage, but he omitted to do so; and for this breach of covenant the present action was brought ten years after the marriage. No special damage was stated in the declaration, or proved. The interest on the mortgages had been regularly paid. Judgment was suffered to go by default, and a writ of inquiry was executed before the under-sheriff of Middlesex, when nominal damages were given. *Wightman*, in the present term, obtained a rule to show cause why the inquiry should not be set aside, or the damages increased.

Follett now showed cause. This is a hard application, and for an object which cannot have been contemplated when the settlement was drawn. The intention undoubtedly was, that if any of the mortgages should be enforced against the estate, the trustees should have a remedy against the defendant for any damage that might arise in consequence, affecting the objects of their trust.

*773] It is only by such injury, if it accrued, that the *damages to be recovered in such an action as this could be measured. It is not now pretended that any injury has been sustained; the estate has been found sufficient to answer the purposes of the trust, and pay the interest of the mortgages; and, under such circumstances, it cannot have been intended that the defendant should be compelled to clear off encumbrances to this large amount. Supposing any of the

encumbrancers chose to enforce his claim, it does not follow that he would proceed against the estate; and therefore the estate is not necessarily damaged to the amount of the mortgages left unpaid, nor are the plaintiffs entitled to recover as if such were the case. If they had any claim against the defendant, they should have proceeded in a court of equity, where in a case of this kind, justice could have been done according to the real merits; and there can be doubt that in such a court they would not have recovered the sum now demanded.

Wightman, contra. If this case is to be carried into equity, it is for the defendant to take that step. He may apply for an injunction. But, as far as regards law, if the argument on his part were to prevail, this covenant would be reduced to a mere nullity.

Lord TENTERDEN, C. J. If the plaintiffs are only to recover a shilling damages, the covenant becomes of no value at law. The rule must be absolute for setting aside the inquisition and for a new inquiry; but a part of the rule will be, that no execution issue on the new inquiry till the sixth day of next term. The defendant may, if he thinks fit, go into a court of equity, where, *cer- [*774 tainly, this matter would be better arranged than here.

LITTLEDALE, J., concurred.

PARKE, J. The defendant may go into a court of equity, if he has equity on his side. But at law the trustees were entitled to have this estate unencumbered at the end of a year from the marriage. How could that be enforced, unless they could recover the whole amount of the encumbrances in an action on the covenant?

TAUNTON, J., concurred.

Rule absolute as above.

TAYLOR and Another, Assignees of WALSH, a Bankrupt, v. GREGORY.
June 13.

A verdict was taken for 3000*l.* subject to an award, to be made by a certain day, as to the amount of damages. The arbitrator accidentally let the day pass without making his award, and the defendant's attorney would not consent to the time being enlarged. The Court granted liberty to the plaintiff to enter up judgment and issue execution forthwith for the whole amount of the verdict, unless the enlargement were consented to. But at the instance of the bail, they ordered that no execution should issue against them before a certain time, when it appeared that the defendant, who was abroad, would probably be in England.

A VERDICT having been taken in this case for 3000*l.*, subject to a reference as to the amount of damages, (a) the arbitrator accidentally omitted to enlarge the time for making his award; and the day appointed for that purpose having elapsed, and no award being made, a rule was obtained in this term, calling on the defendant to show cause why the plaintiff should not be at liberty to enter up judgment and issue *execution forthwith, unless the defendant should [*775 consent to an enlargement of the time; and why the defendant or his attorney should not pay the costs of that application. It appeared by the affidavits of the respective parties that the defendant's attorney had been requested to consent that the time might be enlarged, but refused, except upon certain conditions, one of which was, that the bail should be exonerated; and it was admitted that the object contemplated in preventing the reference from proceeding was to gain time for the bail till the defendant himself (who had left England while the action was depending) should return. It appeared that the defendant had given a promise to this effect, and that a letter had been received from him, dated in the preceding March, in which he requested to be informed of the progress of the cause, engaged to relieve those who might be subject to liability on his account, and desired that an answer might be sent to him in Jamaica, to which place he was then proceeding from South America.

(a) See p. 264, ante.

Campbell and Richards now showed cause. *Harper v. Abrahams*, 4 B. Moore, 3, is an authority against this application. There a verdict was taken in an action of trover, subject to a reference as to the value of the property. The arbitrator died without having made an award. The parties agreed that another should be substituted; but the defendant afterwards withdrew his consent. The Court of Common Pleas refused a rule for delivering the postea to the plaintiff, or inserting the name of the proposed new arbitrator in the order of reference: *776] and *they said that the death of the arbitrator without having made an award was an opening of the cause. [Lord TENTERDEN, C. J. It would not properly be an opening of the cause where nothing but the amount of damages was referred.] There might have been ground for this application if the reference had gone off by any fault of the defendant; but no blame attaches to him.

Follett, contra. The plaintiffs here have a verdict, only subject to arbitration as to the damages. They are entitled to have judgment and execution to some amount, and ought not to be deprived of that advantage, nor the defendant placed in a better situation than before, by an accidental omission of the arbitrator. In *Woolley v. Kelly*, 1 B. & C. 68, where a verdict had been found for 400*l.*, subject to a reference as to the amount, but the arbitrator, finding that he had advised as counsel in the cause, declined proceeding, and the defendant refused to name another arbitrator, this Court ordered judgment and execution to issue for 400*l.*, unless the defendant would consent to another arbitrator being appointed.

The Court were of opinion that the rule should be made absolute, except as to costs: but, referring to the letter above mentioned, they ordered that no proceedings should be taken for fixing the bail before the end of Michaelmas term.

Rule absolute on these terms.

*777] *In the Matter of Arbitration between CHURCHER, Gent., one, &c., and STRINGER, Gent., one, &c. June 13.

On an award directing payment of money at a certain time, interest, from that time till payment, may be recovered by action, but not by motion for an attachment.

CERTAIN matters in difference between the above parties, were referred to an arbitrator, who awarded that Stringer should pay Churcher a sum of money on the 24th of November, 1830. The money not being paid (though Churcher attended at the proper time and place to receive it), a rule nisi was obtained on the 21st of January following, for an attachment for non-payment of the sum awarded; and, on cause being shown, this Court referred it to the Master to ascertain whether or not certain deductions should be made. The Master reported, on the 5th of May, that the whole ought to be paid, which was done on the 9th, but Churcher claimed interest from the time of payment fixed in the award, until the day when the debt was actually discharged; and he received the principal sum without prejudice. A rule was obtained in the present term, calling upon Stringer to show cause why an attachment should not issue against him for not paying certain sums in the rule specified, being the interest upon the sum awarded, from the 24th of November to the 21st of January, and from thence to the 9th of May.

Kelly now showed cause, and admitted that he knew of no decision upon the point, but contended that the rule not being sanctioned either by express authority or by practice, ought not to be granted.

*778] **Hoggins, contra*, being asked by the Court, if he could refer to any authority, said there was none on the precise point, but that in an action brought upon an award, Abbott, C. J., had held interest to be recoverable from

the time of demand; *Marquis of Anglesey v. Chafey*, Manning's Digest, tit. *Interest*, A. (a), pl. 19, and *Pinhorn v. Tuckington*, 3 Campb. 468 (where the demand was made at the day and place appointed, as in the present case), was to the same effect: and there appeared no reason why, in case of an award, interest as well as principal should not be recoverable both by attachment and by action.

Lord TENTERDEN, C. J. In an action brought upon an award, interest may certainly be recovered, and I have myself held so more than once; but I never heard that it could be proceeded for by motion for an attachment. That distinction has always prevailed in practice; interest as well as principal may be recovered in an action, but on motion, the principal only.

The rest of the Court concurred.

Kelly then prayed that the rule might be discharged with costs, but the Court refused this. Rule discharged, without costs.

*RILEY v. BYRNE. June 13.

[*779]

A defendant compromised an action for libel, by agreeing to apologize, and pay the plaintiff's costs. The apology was made, and a rule of Court obtained, ordering the defendant to pay the costs, amounting to 67*l.* On default made, an attachment issued, and the defendant was committed. While in custody he became bankrupt, and obtained his certificate: Held, that the sum named in the rule of Court, was a debt which might have been proved under the commission, and that the defendant was entitled to be discharged out of custody.

RILEY brought an action against Byrne for a libel. After notice of trial, the cause was compromised, the defendant agreeing to apologize, and pay the plaintiff's costs as between attorney and client. The apology was made and accepted, and in Hilary term, 1827, a rule of this sort was made in the cause, ordering the defendant to pay the plaintiff 67*l.* 13*s.*, his costs of the action, and 7*l.* 15*s.*, the costs of applying for the rule. The defendant paid 40*l.* in part, and the remainder being undischarged, an attachment was obtained against him for the contempt, and he was committed. Afterwards, in 1831, being still in custody, he became bankrupt and obtained his certificate, whereupon a rule nisi was granted for discharging him out of custody as to the present action.

Campbell now showed cause. The question is, Whether this defendant be in custody for a debt which was proveable under his commission. He is, in fact, under attachment for non-performance of an agreement to do certain things: part of that agreement was to make an apology, which has been done; the rest was to indemnify the plaintiff against costs, the amount of which was not ascertained till the rule of Court was made. Before that time there was no proveable debt; and if so, the rule of Court could not create one; it only gave a remedy. *Ex parte Eicke*, 1 Glyn & Ja. 261, may be cited on *the other side, but is not applicable; there the order of Court was for payment of a pre-existing debt, which would have been proveable under the commission independently of the order. [*780]

Kelly *contra*. This was a proveable debt before the rule of Court, and the rule does not alter its nature. An award is not the less proveable under a commission because it may be enforced by rule of Court and attachment. In *Rex v. Edwards*, 9 B. & C. 652, an attorney, who was in custody for contempt in not paying over a balance of money found due from him upon taxation, pursuant to a rule of court ordering such payment, became bankrupt and obtained his certificate, and it was held that the attachment did not prevent his being discharged from the demand, as from a debt proveable under the commission. Here, as soon as the plaintiff had acted upon the agreement by ceasing to prosecute his action, there was a debt in contemplation of law; the amount only was to be ascertained by reference to the Master. His allocatur, when made, operated as

an award, and the defendant was from thenceforth precluded from disputing that a specific sum (namely, that fixed by the Master), had become due by virtue of the agreement. The debt not only accrued but was liquidated before the bankruptcy.

Per Curiam.(a) The question is, whether the undertaking entered into by this defendant was such as to constitute a debt proveable under the commission.

*781] We think that it did in substance constitute a debt, and that *the case was not merely that of an attachment for disobedience to a rule of Court. The defendant agreed, upon good consideration, to pay what should be found due for the plaintiff's costs. The master's allocatur operated as an award; and the plaintiff had a complete right of proof for liquidated damages before the bankruptcy. The rule must, therefore, be absolute. Rule absolute.

(a) Lord TENTERDEN, C. J., LITTLEDALE, PARKE, and TAUNTON, Js.

GREEN v. MILLER.

After error brought, the Court can only amend the record in respect of misprision of the clerk; and, therefore, the Court refused to allow a plaintiff in replevin, who had pleaded two bad pleas, and after judgment in his favour in this Court, and error brought, to withdraw the same and plead de novo.

REPLEVIN for taking goods and standing corn. Cognizance, that by deed of the 25th of September, 1806, Taylor granted to Hodgson an annuity charged on the premises, with power to enter and distrain for the arrears; and that Miller, as Hodgson's bailiff, entered and distrained for arrears of that annuity. Plea in bar, that by deed of the 7th of May, 1806, Taylor granted to Watton an annuity charged on the same premises, and for better securing the payment, granted, bargained, sold, and demised them to Fletcher for ninety-nine years, with power to levy arrears by distress, entry on the premises, &c., and that arrears had accrued and were due. Upon demurrer, judgment was given in this Court for the plaintiff. The defendant having sued out a writ of error to the Exchequer Chamber, the case was there argued in the course of the present term, 8 Bing. 92, and the Court intimated an opinion that the pleas in bar were bad for not *782] alleging an entry by Fletcher, or that he had elected *that the deed should enure by way of bargain and sale, but they deferred giving judgment in order that the plaintiff might apply to this Court to amend the record, by inserting in the pleas an averment that Fletcher entered by virtue of the demise. A rule nisi having been obtained for liberty to withdraw the pleas, and plead them de novo, together with two additional pleas to each cognizance, *Erskine* was now heard against the rule, and *Campbell* and *Manning* in support of it.

Per Curiam. The power to amend, given by 14 Ed. 3, stat. 1, c. 6, is confined to misprisions of a clerk in writing one syllable or letter too much or too little; and the 9 H. 5, stat. 1, c. 4 (made perpetual by 4 H. 6, c. 3), recites the first-mentioned statute, and empowers the justices to amend such defects as well after judgment as before. Then, the question is, has there been any misprision of the clerk in this case? Clearly not. The word clerk imports some officer of the Court coming within that description. The misprision here is that of the party, his counsel or attorney having pleaded two bad pleas. The rule, therefore, must be discharged. Rule discharged.

has now elapsed, and then and there delivered the said note to the said X. Y., and the said X. Y. then and there endorsed the same to the defendant, and the defendant then and there endorsed the same to the plaintiff [*or, and the defendant then and there endorsed the same to Q. R., and the said Q. R. then and there endorsed the same to the plaintiff*]; and the said C. D. did not pay the amount thereof, although the same was there presented to him on the day when it became due of all which the defendant then and there had due notice.

Count on an inland bill of exchange against the acceptor by the drawer, being also payee.

Whereas the plaintiff on _____ at London [*or, in the county of* _____], made his bill of exchange in writing, and directed the same to the defendant, and thereby required the defendant to pay to the plaintiff £ {
 days
 weeks
 months } after the {
 date
 sight } thereof, which period has now elapsed; and the defendant then and there accepted the said bill, and promised the plaintiff to pay the same according to the tenor and effect thereof and of his said acceptance thereof, but did not pay the same when due.

Count on an inland bill of exchange against the acceptor by the drawer, not being the payee.

Whereas the plaintiff on _____ at London [*or, in the county of* _____], made his bill of exchange in writing, and directed the same to the defendant, and thereby required the defendant to pay to O. P., or order, £ {
 days
 weeks
 months } after the {
 date
 sight } thereof, which

*785] *period has now elapsed, and then and there delivered the same to the said O. P.: and the said defendant then and there accepted the same, and promised the plaintiff to pay the same according to the tenor and effect thereof and of his acceptance thereof, yet he did not pay the amount thereof, although the said bill was there presented to him on the day when it became due, and thereupon the same was then and there returned to the plaintiff, of all which the defendant then and there had notice.

Count on an inland bill of exchange against the acceptor by endorsee.

Whereas one E. F., on _____ at London [*or, in the county of* _____], made his bill of exchange in writing, and directed the same to the defendant, and thereby required the defendant to pay to the said E. F. [*or, to H. G.*], or order £ {
 days
 weeks
 months } after the {
 date
 sight } thereof, which period is now elapsed, and the defendant then and there accepted the said bill, and the said E. F. [*or, the said H. G.*] then and there endorsed the same to the plaintiff [*or, and the said E. F., or, the said H. G. then and there endorsed the same to K. J., and the said K. J. then and there endorsed the same to the plaintiff*], of all which the defendant then and there had due notice, and then and there promised the plaintiff to pay the amount thereof, according to the tenor and effect thereof and of his acceptance thereof.

Count on an inland bill of exchange against the acceptor by the payee.

Whereas one E. F., on _____ at London [*or, in the county of* _____], made his bill of exchange in writing, and directed the same to the defendant, and thereby required the defendant to pay to the plaintiff £ {
 days
 weeks
 months } after the {
 sight
 date } thereof, which period has now elapsed; and the defendant then and there accepted the same, and promised the plaintiff to pay the same according to the tenor and effect thereof and of his acceptance thereof.

Count on an inland bill of exchange against the drawer by payee on non-acceptance.

Whereas the defendant on _____ at London [*or, in the county of* _____], made his bill of exchange in writing, and directed the same to J. K., and thereby required the said J. K. to pay to the plaintiff £ {
 days
 weeks
 months } after the {
 sight
 date } thereof, and then and there delivered the same to the said plaintiff, and the same was then and there presented to the said J. K. for acceptance, and the said J. K. then and there refused to accept the same; of all which the defendant then and there had due notice.

Count on an inland bill of exchange against drawer by endorsee on non-acceptance.

*786] Whereas the defendant on _____ at London [*or, in the county of* _____], made his bill of exchange in writing, and directed the same *to J. K., and thereby required the said J. K. to pay to the order of the said defendant £ {
 days
 weeks
 months } after the {
 sight
 date } thereof, and the said defendant then and there endorsed the same to the plaintiff [*or,*

and the said defendant then and there endorsed the same to L. M., and the said L. M. then and there endorsed the same to the plaintiff], and the same was then and there presented to the said J. K. for acceptance, and the said J. K. then and there refused to accept the same; of all which the defendant then and there had due notice.

Count on an inland bill of exchange against endorser by endorsee on non-acceptance.

And whereas one N. O., on _____ at London [or, in the county of _____], made his bill of exchange in writing, and directed the same to P. Q., and thereby required the said P. Q. to pay to his order £ { days weeks months } after the { date sight } thereof, and the said N. O. then and there endorsed the said bill to the defendant [or, to R. S., and the said R. S. then and there endorsed the same to the defendant], and the defendant then and there endorsed the same to the plaintiff, and the same was then and there presented to the said P. Q. for acceptance, and the said P. Q. then and there refused to accept the same; of all which the defendant then and there had due notice.

Count on an inland bill of exchange against payee by endorsee on non-acceptance.

Whereas one N. O., on _____ at London [or, in the county of _____], made his bill of exchange in writing, and directed the same to P. Q., and thereby required the said P. Q. to pay to the defendant or order £ { days weeks months } after the { sight date } thereof, and then and there delivered the same to the defendant, and the defendant then and there endorsed the said bill to the plaintiff [or, to R. S., and the said R. S. then and there endorsed the same to the plaintiff], and the same was then and there presented to the said P. Q. for acceptance, and the said P. Q. then and there refused to accept the same, of all which the defendant then and there had due notice.

Direction for declarations on bills where action brought after time of payment expired.

If the declaration be against any party to the bill except the drawee or acceptor, and the bill be payable at any time after date, and the action not brought till the time is expired, it will be necessary to insert, as in declarations on promissory notes, immediately after the words denoting the time appointed for payment, the following words, viz. *which period has now elapsed*; and instead of averring that the bill was presented to the drawee for acceptance, and that he refused to accept the same, to allege that the drawee [naming him] *did not pay the said bill, although the same was there presented to him on the day when it became due.*

*And if the declaration be against any party except the drawee or acceptor, and the bill be payable at any time after sight, it will be necessary to insert, after the words [787] denoting the time appointed for payment, the following words; viz. *and the said drawee [naming him] then and there saw and accepted the same, and the said period has now elapsed*; and instead of alleging that the bill was presented for acceptance and refused, to allege that the drawee [naming him] *did not pay the said bill, although the same was presented to him on the day when it became due.*

Directions for declarations on bills or notes payable at sight.

If a note or bill be payable at sight, the form of the declaration must be varied so as to suit the case, which may be easily done.

Declarations on foreign bills may be drawn according to the principle of these forms with the necessary variations.

Common Counts.

Whereas the defendant on _____ at London [or, in the county of _____], was indebted to the plaintiff in £ _____ for the price and value of goods, then and there { bargained sold } and { sold delivered } by the plaintiff to the defendant at his request:

And in £ _____ for the price and value of work then and there done, and materials for the same provided by the plaintiff for the defendant at his request:

And in £ _____ for money then and there lent by the plaintiff to the defendant at his request:

And in £ _____ for money then and there paid by the plaintiff for the use of the defendant at his request:

And in £ _____ for money then and there received by the defendant for the use of the plaintiff:

And in £ _____ for money found to be due from the defendant to the plaintiff on an account then and there stated between them.

General conclusion.

And whereas the defendant afterwards, on, &c., in consideration of the premises respectively, then and there promised to pay the said several moneys respectively to the plaintiff on request

Yet, he hath disregarded his promises, and hath not paid any of the said moneys, or any part thereof, to the plaintiff's damage of £ and thereupon he brings suit, &c.

Direction as to the general conclusion.

If the declaration contains one or more counts against the maker of a note or acceptor of a bill of exchange, it will be proper to place them first in the declaration, and then in the general conclusion to say, promised to pay the said *last-mentioned several moneys respectively*.

*788]

*REGULÆ GENERALES.

IT IS ORDERED, That a defendant may justify bail at the same time at which they are put in, upon giving four days' notice for that purpose, before eleven o'clock in the morning, and exclusive of Sunday. That if the plaintiff is desirous of time to inquire after the bail, and shall give one day's notice thereof as aforesaid to the defendant, his attorney or agent, as the case may be, before the time appointed for justification, stating therein what further time is required, such time not to exceed three days in the case of town bail, and six days in the case of country bail, then (unless the Court or a Judge shall otherwise order) the time for putting in and justifying bail shall be postponed accordingly, and all proceedings shall be stayed in the mean time.

AND IT IS FURTHER ORDERED, That every notice of bail shall, in addition to the descriptions of the bail, mention the street or place, and number (if any), where each of the bail resides, and all the streets or places, and numbers (if any), in which each of them has been resident at any time within the last six months, and whether he is a housekeeper or freeholder.

AND IT IS FURTHER ORDERED, That if the notice of bail shall be accompanied by an affidavit of each of the bail according to the form hereto subjoined, and if the plaintiff afterwards except to such bail, he shall, if such bail are allowed, pay the costs of justification, and if such bail are rejected, the defendants shall pay the costs of opposition, unless the Court or a Judge thereof shall otherwise order.

AND IT IS FURTHER ORDERED, That if the plaintiff shall not give one day's notice of exception to the bail, by whom such affidavit shall have been made, the recognisance of such bail may be taken out of Court without other justification than such affidavit.

AND IT IS FURTHER ORDERED, That the bail, of whom notice shall be given, shall not be changed without leave of the Court or a Judge.

AND IT IS FURTHER ORDERED, That with every declaration, if delivered, or with the notice of declaration, if filed, containing counts in *indebitatus assumpsit*, or debt on simple contract, the plaintiff shall deliver full particulars of his demand under those counts, where such particulars can be comprised within three folios; and where the same cannot be comprised within three folios, he shall deliver such a statement of the nature of his claim, and the amount of the sum or balance which he claims to be due, as may be comprised within that number of folios. And to secure the delivery of particulars in all such cases, IT IS FURTHER ORDERED, that if any declaration or notice shall be delivered without such particulars, or such statement as aforesaid, and a Judge shall afterwards order a delivery of particulars, the plaintiff shall not be allowed any costs in respect of *any summons for the purpose of obtaining such order, or of the particulars he may afterwards deliver. And that a copy of the particulars of the demand, and also particulars (if any) of the defendant's set-off, shall be annexed by the plaintiff's attorney to every record at the time it is entered with the Judge's marshal.

AND IT IS FURTHER ORDERED, That upon every declaration, delivered or filed on or before the last day of any term, the defendant, whether in or out of any prison, shall be compellable to plead as of such term without being entitled to any imparlance.

AND IT IS FURTHER ORDERED, That no judgment of *non proce* shall be signed for want of a declaration, replication, or other subsequent pleading, until four days next after a demand thereof shall have been made, in writing, upon the plaintiff, his attorney or agent, as the case may be.

AND IT IS FURTHER ORDERED, That hereafter it shall not be necessary to issue more than two summonses for attendance before a Judge upon the same matter; and the party taking out such summonses shall be entitled to an order on the return of the second summons, unless cause is shown to the contrary.

AND IT IS FURTHER ORDERED, That no declaration *de bene esse* shall be delivered until the expiration of six days from the service of the process in the case of process which is notailable, or until the expiration of six days from the time of the arrest in case ofailable process; and such six days shall be reckoned inclusive of the day of such service or arrest.

AND IT IS FURTHER ORDERED, That declarations in ejectment may be served before the first day of any term, and thereupon the plaintiff shall be entitled to judgment against the casual ejector in like manner as upon declarations served before the *essoins* or first general return-day.

AND IT IS FURTHER ORDERED, That before taxation of costs, one day's notice shall be given to the opposite party.

AND IT IS FURTHER ORDERED, That no rule to show cause, or motion shall be required, in order to obtain a rule to plead several matters, or to make several avowries or cognisances; but that such rules shall be drawn up upon a Judge's order, to be made upon a summons, accompanied by

a short abstract or statement of the intended pleas, avowries, or cognisances. Provided, that no summons or order shall be necessary in the following cases, that is to say, where the plea of *non accumpsit*, or *nil debet*, or *non detinet*, with or without a plea of tender as to part, a plea of the statute of limitations, set-off, bankruptcy of the defendant, discharge under an insolvent act, *plend administravit*, *plend administravit præter*, infancy, and coverture, or any two or more of such pleas shall be pleaded together; but in all such cases, a rule shall be drawn up by the proper officer, upon the production of the engrossment of the pleas, or a draft or copy thereof.

AND IT IS FURTHER ORDERED, That these rules shall take effect on the first day of next Michaelmas term, except the rule as to the service of *declarations in ejectment, which shall take effect from the 25th day of October next. [*790]

(Signed by the fifteen Judges.)

Form of Affidavit.

IN THE

BETWEEN, &c.

A. B., one of the bail for the above-named defendant, maketh oath and saith that he is a housekeeper [or, freeholder, as the case may be], residing at [describing particularly the street or place, and number, if any], that he is possessed of property to the amount of £ [the amount required by the practice of the Courts] over and above all his just debts; [if bail in any other action, add "and every other sum for which he is now bail;"] that he is not bail for any defendant except in this action [or, if bail in any other action or actions, add "except for C. D. at the suit of E. F. in the Court of in the sum of £ ; for G. H. at the suit of I. K. in the Court of in the sum of £ ;" specifying the several actions with the Courts in which they are brought, and the sums in which the deponent is bail;] that the deponent's property, to the amount of the said sums of £ [and if bail in any other action or actions, "of all other sums for which he is now bail as aforesaid,"] consists of [here specify the nature and value of the property, in respect of which the bail proposes to justify, as follows:—Stock in trade, in his business of carried on by him at of the value of £ of good book debts owing to him to the amount of £ of furniture in his house at of the value of £ of a freehold or leasehold farm, of the value of £ situate at occupied by or of a dwelling-house of the value of £ situate at occupied by or of other property, particularising each description of property, with the value thereof;] and that the deponent hath for the last six months resided at [describing the place or places of such residence.]

Swear, &c.

END OF TRINITY TERM.

CASES
ARGUED AND DETERMINED
IN THE
COURT OF KING'S BENCH,

IN
Michaelmas Term,

IN THE SECOND YEAR OF THE REIGN OF WILLIAM IV. 1831.(a)

MEMORANDUM.

IN the course of this vacation Charles Butler, and Henry William Tancred, and Philip Williams of Lincoln's Inn, Esquires, and Francis Ludlow Holt, of the Inner Temple, Esquire, were appointed his Majesty's counsel, learned in the law.

(a) LITTLEDALE, J., sat in the Bail Court during this term.

***792] *The Proprietors of the STOURBRIDGE Canal v. WHEELEY and Others.**

Where a canal is made pursuant to act of parliament, the right of the proprietors to toll is derived entirely from the act; and is to be considered as if there was a bargain between them and the public, the terms of which are expressed in the statute: and the rule of construction is, that any ambiguity in the terms of the contract must operate against the company of adventurers, and in favour of the public. The proprietors, therefore, can claim nothing which is not clearly given to them by the act.

A canal was formed upon two levels, which were connected by a chain of locks. Upon the upper level, there was no lock whatever.

By the act of parliament for making the canal, all persons were to be at liberty to navigate there-upon with boats, upon payment of such rates and dues as should be demanded by the company, not exceeding the rates therein mentioned; and, by another clause, the company were authorized to take certain rates and duties for every ton of iron and other goods navigated on any part of the canal, and *which should pass through any one or more of the locks*; and power was given to the owners of adjoining lands to use pleasure boats on the canal, without paying dues, so as the same did not pass through any lock, and were not used for carrying goods:

Held, that this act gave no right to demand toll for boats navigating the upper level of the canal, in which there were no locks.

THIS case was argued in the last term (a) by Sir *James Scarlett* for the plaintiff, and *Campbell* for the defendants. The facts of the case, the several clauses of the act of parliament upon which the question arose, and the arguments

(a) Before Lord TENTERDEN, C. J., LITTLEDALE, PARKE, and TAUNTON, J.

urged, are so fully stated and commented on in the judgment delivered by the Court, that it is deemed unnecessary to notice them here. *Cur. adv. vult.*

Lord TENTERDEN, C. J., in the course of this term, delivered the judgment of the Court.

This case was argued before us in the last term. It was an action of assumpsit brought by the plaintiffs to recover the sum of 492*l.* 9*s.* as a compensation for the use of a way or passage for boats loaded with coals and other merchandise, along a part of the plaintiffs' canal, made under the powers of the 16 G. 3, c. 28, an act of parliament for making and maintaining the Stourbridge
[*793
*Canal with two collateral cuts. This canal was formed upon two levels; the upper or summit level, which communicates with the Dudley Canal, then intended to be made and since completed; upon the whole of which level there is no lock; and the lower or Stourbridge level, extending from Stourbridge to Stourton; and the two levels are connected by a chain of sixteen locks. The defendants have carried large quantities of coals and other goods, part from the Dudley Canal, part not, along the upper level, without passing through any lock. Until recently they have paid to the plaintiffs a compensation in the nature of tonnage for the coals and goods so carried, as other persons have also done; but the defendants having latterly refused to do so, this action has been brought; and the question is, whether the plaintiffs are entitled to demand anything for the use of the part of the canal on which the defendants have so navigated; if they are, the sum claimed is admitted to be reasonable, and the plaintiffs are entitled to recover it: if they are not, the previous payments by the defendants cannot render them liable, and the plaintiffs cannot recover anything.

The canal having been made under the provisions of an act of parliament, the rights of the plaintiffs are derived entirely from the act. This, like many other cases, is a bargain between a company of adventurers and the public, the terms of which are expressed in the statute; and the rule of construction in all such cases is now fully established to be this,—that any ambiguity in the terms of the contract must operate against the adventurers, and in favour of the public; and the plaintiffs can claim nothing which is not *clearly* given to them by the act. This rule is laid down in distinct terms by *the Court in the case
[*794
of *The Hull Dock Company v. La Marche*, 8 B. & C. 51, where some previous authorities are cited; and it was also acted upon in the case of *The Leeds and Liverpool Canal Company v. Hustler*, 1 B. & C. 424.

Adopting this rule, we are to decide whether a right to demand some compensation for the use of this part of the canal, is *clearly and unambiguously* given to the plaintiffs by this act of parliament; and we think it is not.

The act of parliament recites that the proposed canal will be of public utility (p. 732); the company are empowered to purchase land for the use of the navigation (p. 748); the lands acquired by voluntary or compulsory sale are vested in the proprietors for the use of the navigation, and for no other use or purpose whatsoever (p. 759); and all persons whatsoever are to have free liberty "to navigate upon the canal and collateral cuts with any boats or other vessels" of certain dimensions, "and to use the wharfs and quays for loading and unloading any goods, wares, merchandise, and commodities; and also to use the towing paths with horses for haling and drawing such boats and vessels *upon payment of such rates and dues as shall be demanded by the said company of proprietors not exceeding the rates before mentioned in the statute*" (p. 788). This refers to a previous clause, p. 777, which provides that, in consideration of the great charge and expense of the proprietors in making, maintaining, and supplying with water the canal and collateral cuts, &c., it shall be lawful for the company from time to time to ask, demand, take, and recover for their own use and benefit for the tonnage and wharfage of iron, &c., and other commodities navigated, carried, *and conveyed thereon, such rates and duties as they shall think fit, not
[*795
exceeding the sum of sixpence for every ton of iron, &c., navigated on any part of the canal, and which shall pass *through any one or more of the locks* which shall be erected on the said canal. A similar provision is made for the

tonnage and wharfage of goods in vessels navigated on the collateral cuts; and a power of bringing an action for arrears or distraining is given to the company.

Now, it is quite certain that the company have no right *expressly* given to receive any compensation except the tonnage paid for goods carried through some of the locks on the canal or the collateral cuts; and it is therefore incumbent upon them to show that they have a right *clearly* given by inference from some of the other clauses.

One of the clauses relied upon by the plaintiffs is that which gives the public the use of the canal, p. 788, and it is contended that no persons have a right to use any part of the canal under that clause, except those who actually do pay some of the rates or dues, and consequently pass some of the locks; and that if individuals have no right to navigate a particular part, the company may make their own bargain as to the terms upon which they may be permitted to do so.

But the clause in question is capable of two constructions; one, that those persons who pass the locks, and therefore pay the rates, and those *only*, are entitled to navigate any part of the canal or cuts; the other, that all persons are entitled to use it, paying rates when rates are due. The former of these constructions is against the public and in favour of the company, the latter is in
*796] favour of the public and against the *company, and is therefore, according to the rule above laid down, the one which ought to be adopted.

And indeed the more obvious meaning of this clause is, to declare that the canal is dedicated to the public, but, at the same time, to preserve the right of the company to the rates already given; and it is reasonable to suppose that, by the section p. 777, which gives the rates as a compensation for the expenses of the proprietors, the legislature meant to include *all* the benefit they were to derive from the canal, and not to leave the company to make what agreement they pleased with the public in cases not provided for, and to gain an unlimited profit from a particular part of it. They probably did not contemplate the case of persons using the canal who did not pass any lock; but whether the omission was intentional, or arose from inadvertence, it is still an omission in that clause which provides for the emolument of the company.

Another section upon which some reliance was placed, was that in page 789, which gives to the owners of adjoining lands the power to use any pleasure boats on the canal, &c. (so as the same do not pass through any lock), without paying any rates or dues for the same, and so as such boat be not *used for carrying any goods*; and it is argued that the inference arising from the latter part of this clause is, that pleasure boats carrying goods would be liable to pay rates, though they should pass no locks; and if pleasure boats, then all other boats should be equally liable. And there is no doubt but that this provision does afford some colour for this argument. The object of the clause appears to have been, partly to secure the right of the proprietors to use the canal with pleasure
*797] boats; (and in that respect it was introduced pro *majore cautela;) and partly to prevent the company being injured by their passing through locks; and the framer of the clause seems to have added the last provision in the section merely to put pleasure boats with goods on board, on the footing of loaded vessels, without considering whether loaded vessels were liable to duties or not. At any rate this clause is not sufficient, in our judgment, to enable us to say that it is *clear* the legislature intended to give the plaintiffs the right to the compensation claimed for the use of a part of the canal where there is no lock.

Upon the principle of construction, therefore, above laid down, viz., that the company are entitled to impose no burthen on the public for their own benefit except that which is clearly given by the act, we are of opinion that, as their right to claim this compensation is not clearly given by the act, the plaintiffs are not entitled to recover.

Judgment for defendants.

COCKBURN v. HARVEY and Another.

The statute 59 G. 3, c. 134, s. 30, enacts, that in every district, parish, or division of any parish or district, in which any church or chapel shall be built, in which there shall not be a distinct vestry belonging to such district or division, a select vestry, consisting of so many persons as shall be directed by the commissioners in that behalf, shall be appointed by the latter out of the substantial inhabitants of the district or division, *for the care and management of the concerns of the church, and all matters and things relating thereto*: Held, that a select vestry appointed pursuant to this provision of the act, has no power to impose a rate for the repair of the district church.

DECLARATION in prohibition stated that the defendants, contriving, &c., had cited the plaintiff, and drawn him into a plea in the ecclesiastical court before the commissary of the Bishop of Winchester to compel the plaintiff to pay a rate made to defray the expenses of repairing the district church of Saint George, *Camberwell, built pursuant to the 58 G. 3, c. 45. It appeared [*798 by the libel which was set out in the declaration, that the rate in question was made by a select vestry appointed for the district by commissioners pursuant to the statute 59 G. 3, c. 134, s. 30. On demurrer to the declaration, the question was, whether the select vestry so appointed for the district had power to impose a church rate. The case was argued in the course of last term by *Hutchinson* in support of the demurrer, and by *Joshua Evans*, *contrâ*. For the defendants, it was contended that the 59 G. 3, c. 134, s. 30, which authorized the appointment of the select vestry "for the care and management of the concerns of the church and all matters and things relating thereto," gave that vestry, by implication, a power of making church rates. On the other hand, it was said that the right of imposing church rates, which, by the common law, was in the churchwardens and parishioners in vestry assembled, was, by the 58 G. 3, c. 45, s. 70, vested in the churchwardens and inhabitants of the district, (which, for all ecclesiastical purposes, was thereby made a separate parish), and could not be taken away from them and given to a select body by the subsequent statute 59 G. 3, c. 134, s. 30, by mere implication, and without express words; it being a general rule that acts of parliament varying or taking away the rights of parties should be construed strictly; in support of which position, *Fludyer v. Sir Thomas Lombe*, Cas. temp. Hardw. 307, *Denn v. Diamond*, 4 B. & C. 243, *Rex v. Croke*, Cowper, 26, *Hull Dock Company v. La Marche*, 8 B. & C. 42, *Buckeridge v. Flight*, 6 B. & C. 49, were cited; and, applying that rule *of construction to the clause in question, it did not give the select [*799 vestry a power to make a church rate.

Cur. adv. vult.

Lord TENTERDEN, C. J., now delivered the judgment of the Court.

This case depends upon the construction of the thirtieth section of the 59 G. 3, c. 134. The church was built under the powers of the act of the 58 G. 3, c. 45; by the 70th section of which it is enacted, "that the repairs of all such district churches or chapels shall be made by the districts to which they respectively belong, by rates to be raised within the district, in like manner as in case of repairs of churches by parishes; and every such district shall be deemed in law a separate and distinct parish for that purpose."

Rates for the repairs of churches in parishes, by the common law, are to be made by the churchwardens and the vestry, that is, by the churchwardens and inhabitants in vestry assembled, if there be not a select vestry established by usage or act of parliament. So that, if this statute had remained unaltered, the rate in question, being made by the churchwardens and persons acting as a select vestry, would undoubtedly be bad. A select vestry, for purposes connected with the church, is established by the thirtieth section of the 59 G. 3, c. 134, which enacts, "that in every district, parish, &c., in which any church shall be built, acquired, or appropriated under the provisions of the said recited act (58 G. 3, c. 45) or this act, in which there shall not be a distinct vestry belonging to such district or division, a select vestry, consisting of so many persons as shall be

*800] directed by the commissioners in that behalf, shall *be appointed by the commissioners, with the advice of the bishop of the diocese, out of the substantial inhabitants of the district, &c., *for the care and management of the concerns of the church or chapel, and all matters and things relating thereto*; and such select vestry shall annually elect or appoint the churchwarden or chapelwarden to be named on the part of the parish or chapelry, and shall elect new members of such vestry as vacancies may arise by death, resignation, or ceasing to inhabit the parish; and proper pews shall be assigned and provided in every such church for the use of the churchwardens thereof."

It was contended, for the plaintiff, that the powers given to the select vestry by that section did not extend to the *making a rate* for the repairs of the church; and it was urged, that acts of parliament, by which any charge may be brought upon the subject, or the subject be deprived of his rights in derogation of the common law, are to be construed strictly; and several cases were quoted in support of that proposition: I shall notice only two of them, as we consider the principle to be clear. In *Fludyer v. Sir T. Lombe*, Cas. temp. Hardw. 307, Lord Hardwicke (then Chief Justice of this Court) says, "It has been rightly said, that this being a law to take away people's franchises, should be strictly construed." So in the case of *Buckeridge v. Flight*, 6 B. & C. 49, Mr. Justice Holroyd says, "Where acts of parliament vary, or take away the rights of parties, they ought to be strictly construed." Many cases on the construction of the stamp acts have been determined upon this ground. And this principle must be kept in view in putting a

*801] construction upon *this thirtieth section. Under the authority of this section the select vestry was established, and such vestry, therefore, must have the care and management of the concerns of the church, and all matters relating thereto; and the question is, whether the power of making church rates be included in those words and given thereby? Now there are many concerns of the church, and many matters relating thereto, independent of the making rates for its repairs; and the power of making such, not being expressly given, can only be deemed to be given by inference and implication; if it be given at all. And, accordingly, the argument for the defendants put their case on that ground, and it was urged, that the inconvenience of allowing the power to make a rate to exist in a body distinct from the persons who have the care and management of the concerns of the church would be so great, that the legislature must be understood to have intended to give that power by the general words used on this occasion. The Court, however, can know the intention of the legislature only from the language of the statute, and is to interpret that language according to the rules and principles of law. The inconvenience in this case does not appear to be greater than that which must take place under the statute 59 G. 3, c. 12, whereby a select vestry may be appointed for the concerns of the poor, leaving the power of making rates to the persons who before possessed it, that is, to the churchwardens and overseers.

The tenth section of the 3 G. 4, c. 72, does certainly afford an argument in favour of the defendants; for it is thereby enacted, that in every case in which a parish shall be divided into separate parishes for ecclesiastical purposes, or
 *802] separate districts, in which select vestries *shall be appointed by the commissioners, all the members of *the select vestry of the original parish*, residing in the district of the original church, &c., shall continue to act as the vestry of such district and church, in all matters relating to such church *and the repairs thereof*, or to any other ecclesiastical matters, or in distributing any proportion of any charities, &c., which may, under this act, be assigned to such district: provided that no member of any select vestry of such parish shall, after such division, act in any matters relating to any church, &c., or any repairs thereof, or any matters relating thereto, except such as are within, or relate to the division in which he shall reside; and that all members of the select vestry of such parish, resident in any other divisions of such parish, shall be members of the vestries to be appointed for the divisions where they reside. But it is obvious that this section is confined in terms to the previous existence of a select

vestry in the original parish; and it is by no means a *necessary consequence*, that because the legislature thought fit to give the power of making rates (assuming such power to be thereby given) to the select vestry of a new parish taken out of an old parish wherein a select vestry had that power before, therefore the select vestry of such a new parish shall have that power where it was not previously vested in a body of the same description in the old parish; so that the giving of that power, in a case like the present, can at most be considered only as a matter of doubtful, and by no means of necessary or even clear, implication. For these reasons, we are of opinion the judgment of the Court must be for the defendant.

Judgment for the defendant.

*KENT v. SHUCKARD. Nov. 2.

[*803]

An innkeeper is responsible for money belonging to his guest.

THIS was an action against an innkeeper at Brighton, to recover the value of a bag, containing bank notes, lost by the plaintiff during the time he resided as a guest in the defendant's inn. Plea, not guilty. At the trial before Gaselee, J., at the last assizes for the county of Sussex, the following appeared to be the facts of the case:—The plaintiff and his wife, with a young lady (Miss Stratford), arrived at the defendant's inn in the evening of Wednesday the 1st of December, 1830, and took a sitting-room and two bed-rooms so situated, that the door of the sitting-room being open, a person there could see the entrances into both bed-rooms. On the following day, Mrs. Kent went into the bed-room, and laid a reticule, which contained the money, on her bed, and afterwards returned into the sitting-room, leaving the door between that and the bed-room open. After she had remained in the sitting-room about five minutes, she sent Miss Stratford for the reticule, and it was not to be found. On behalf of the defendant, it was urged, among other objections, that an innkeeper was responsible for goods and chattels only, and not for money. The learned Judge reserved this point, and directed the jury to find for the plaintiff, if they thought the money was lost or stolen out of the inn. The jury having found a verdict for the plaintiff,

Andrews, Serjt., now moved for liberty to enter a nonsuit. By the common law, innkeepers are responsible for goods and chattels belonging to their guests. There is no authority to show that they are so for money. If they be, there will be no limit to their responsibility. An innkeeper cannot know or form any judgment of the amount of money a guest may have. [*804]

LORD TENTERDEN, C. J. There are many cases where money has been recovered in an action against carriers, who, like innkeepers, are liable by the custom of the realm; and I cannot see any distinction in this respect between an innkeeper and a carrier. The principle on which the liability of an innkeeper for the loss of the goods of his guest is founded, is, both by the civil and common law, to compel the innkeeper to take care that no improper person be admitted into his house, and to prevent collusion between him and such person. In the Digest, lib. 4, tit. 9, s. 1, after stating the law, that an innkeeper is liable for the goods of his guest, it is said, "*Nisi hoc esset statutum, materia daretur cum furibus adversus eos quos recipiunt coeundi.*" If we were to grant the present rule we should break in upon that principle. If a lady were to leave a valuable shawl in her room, the innkeeper (though unacquainted with its value) would clearly be responsible for it if lost; and, upon the same principle, he must be so in this case.

PARKE, J. This case falls within the general principle upon which the liability of innkeepers is founded, and there is no distinction in this respect between money and goods.

TAUNTON, J. In *Calye's case*, 8 Rep. 33 a, the words of the writ which lies against the innkeeper are stated, and there it is observed that the words "*hospi-*

*805] *tibus damnum *non eveniat,*" are restrained by the first words, "*eorum bona et catalla infra hospitia illa existentia absque subtractione custodire,*" &c., "which words (*bona et catalla*) by the said words *ita quod, &c., hospitibus damnum non eveniat,* although they do not of their proper nature extend to charters and evidences concerning freehold or inheritance, or obligations, or other deeds or specialties, being things in action, yet in this case it is expounded by the latter words to extend to them; *for by them great damages happen to the guest:* and, therefore, if one brings a bag or a chest, &c., of evidences into the inn, or obligations, deeds, or other specialties, and by default of the innkeeper they are taken away, the innkeeper shall answer for them." On the same principle he must be responsible for money.

PATTESON, J. There is no distinction between money and goods, as to the liability of innkeepers. Rule refused.

OWEN v. OWEN. Nov. 8.

A defendant being in custody of the sheriff of C., the plaintiff issued a *testatum ca. sa.*, which was delivered to the sheriff, and on the following day sued out *habeas corpus ad satisfaciendum*, to remove the defendant to the custody of the marshal: it was held, that the execution was completed by the delivery of the *testatum ca. sa.* to the sheriff, and the prisoner was remanded to the custody of the sheriff.

AN action was brought by the plaintiff against the defendant, which was tried at the last Summer assizes for Anglesea, before Bolland, B., who upon a verdict being given for the plaintiff, certified that execution ought to issue immediately. On the 25th of October, the defendant being then in custody of the sheriff of Carnarvon under a *quo minus* from the exchequer, the plaintiff issued a *test. ca. sa.* to charge *him in execution at his suit, which was delivered to the *806] sheriff. On the following day the plaintiff sent down a *habeas corpus ad satisfaciendum* to Carnarvon, with a view to remove the defendant into the custody of the marshal, to which a return was made, stating the defendant's detention under the exchequer process, *and also under the ca. sa. at the plaintiff's suit.*

Platt, upon these facts, moved to remand the defendant into the custody of the sheriff of Carnarvon.

The siger now showed cause. If the execution was perfected by the mere delivery to the sheriff of the *testatum ca. sa.*, it must be conceded that the subsequent proceeding cannot be supported. But the execution was incomplete at the time the *habeas corpus* was served. If the defendant had not been in custody, and a *ca. sa.* had issued, under which he had been arrested by the sheriff, he might have been removed to the custody of the marshal before he was lodged in gaol, and yet the execution would have been so far complete, that the sheriff would have been liable for an escape, and if the plaintiff had discharged the defendant, he could not have retaken him in execution. Where the defendant is in custody at the time a *ca. sa.* is issued, there cannot be an actual caption; but in order to perfect the execution, there ought to be that which is equivalent, an acknowledgment by the sheriff that the party is in his custody at the suit of the plaintiff. This is required from the marshal in the case of a prisoner detained in the King's Bench prison at the suit of the same plaintiff (Tidd, 363, 9th edit.), *807] and appears to be necessary to *make the analogy complete between an actual taking and a mere detention upon a *ca. sa.*

Per Curiam. There is no necessity for any acknowledgment or admission on the part of the sheriff to complete the execution against a prisoner; the mere delivery of the *ca. sa.* is sufficient for that purpose. The prisoner must be remanded. Rule absolute.

HALSE v. PETERS. Nov. 3.

By the stamp act, 55 G. 3, c. 184, schedule, part I., mortgages are subjected to a duty of 25*l.* if the amount of the money secured thereby be uncertain and without limit; but if it be limited, then, to an *ad valorem* duty:

Held, that the limit must be one expressed on the face of the deed.

And, therefore, that a mortgage for 1500*l.*, with covenants for payment of the yearly premium and other costs and charges of an insurance of 1000*l.* upon a particular life for seven years, required a 25*l.* stamp.

COVENANT on a mortgage deed. At the trial before Patteson, J., at the London sittings in last Trinity term, it was objected that the deed was insufficiently stamped. The premises mortgaged were held by the defendant, the mortgagor, for certain terms determinable on lives; and one parcel in particular was demised to him for ninety-nine years (to commence from the expiration of a term previously granted to him and not yet elapsed), determinable on the death of Martha Peter, who, at the time of the last demise (September, 1826), was about four years old. The mortgage deed contained a covenant, that the mortgagee should and might, forthwith, in his own name, but at the mortgagor's expense, insure the life of the said Martha Peter, for seven years, at such office as the mortgagee should choose, for 1000*l.*, to be applied (if payable during the continuance of the mortgage) towards the discharge of the mortgage money (1500*l.*) and interest, and of the yearly premium, and costs and *charges of insurance, or so much thereof as should be in arrear; which premium, and other costs and charges of insurance, the mortgagor, by another covenant, bound himself to pay. The deed bore a 6*l.* stamp. For the defendant it was contended, that by the act 56 G. 3, c. 184, schedule, part I., the deed ought to have had a 25*l.* stamp, being given as a security for money thereafter to become due, and the total amount of which was uncertain.^(a) The learned Judge directed a nonsuit, but gave leave to move to enter a verdict for the plaintiff. [*808]

Richards, in Trinity term, moved accordingly, and put in an affidavit, stating that the premium, and charges of keeping up the policy, on the life in question, for seven years, would amount to about 74*l.* 18*s.*

Coleridge now showed cause. The total amount secured in this case was not limited by the deed, and *therefore the instrument falls within the clause requiring a 25*l.* stamp. It is true, that a reasonable calculation may be made of the expenses attending the insurance, and that they, with the principal and interest, will fall much within 2000*l.* But if there be any uncertainty, however small, the letter of the statute applies. The Court will not look beyond the face of the deed to ascertain what duty is requisite: this was the rule acted upon in *Duck v. Braddyl*, Maclel. Rep. 217, and *Doe v. Lewis*, 10 B. & C. 673. It is usual with conveyancers, to insert a clause in deeds of this kind, limiting the uncertain charges, for the very purpose of avoiding the inconvenience which this plaintiff has incurred. The exception in the schedule, of sums to be advanced for insurance against fire, or of lives for which annuities are granted, strengthens the defendant's argument; for the present case might have been included in that clause, but is not. [*809]

Richards, contrd. It is true, the costs of insurance are not expressly limited

(a) 55 G. 3, c. 184, schedule, part I. title *Mortgage, &c.* "Where the same shall be made as a security for the payment of any definite and certain sum of money, advanced or lent at the time, or previously due and owing, or forborne to be paid, being payable,—Exceeding 1000*l.* and not exceeding 2000*l.*, 6*l.*

"And where the same shall be made as a security for the repayment of money to be thereafter lent, advanced, or paid, or which may become due upon an account current, together with any sum already advanced or due, or without, as the case may be; other than and except any sum or sums of money to be advanced for the insurance of any property comprised in such mortgage or security against damage by fire, or to be advanced for the insurance of any life or lives, pursuant to any agreement in any deed, whereby any annuity shall be granted or secured for such life or lives;—If the total amount of the money secured or to be ultimately recoverable thereupon shall be uncertain and without any limit, 25*l.*

"But if the total amount of the money secured, or to be ultimately recoverable thereupon, shall be limited not to exceed a given sum;—The same duty as on a mortgage for such limited sum"

by the deed ; but the insurance is for a definite term, viz., seven years, and the charges for that period are ascertained with sufficient precision. The sum of 25*l.* is wholly disproportioned to any amount at which they may be calculated. There is no case establishing that the limit referred to in the act must appear on the face of the deed. Where the security is given for the transfer of stock, the duty is, by this very act, to be ascertained by inquiring the average value of such stock at the date of the instrument. The clause of limitation adopted by *810] the conveyancers affords no argument ; for they use it as well with *reference to insurances against fire, though within the exception of the schedule, as to the class of insurances now in question ; which shows, that in both instances, it is only done *ex majori cautela*. Any extraordinary charge of insurance in a case like the present, would arise only from a neglect of the mortgagee, whose business it is to keep the insurance regularly on foot : and his possible default ought not to operate to the disadvantage of the mortgagor.

LORD TENTERDEN, C. J. In that clause of the schedule which enacts that, where the total amount of money secured shall be limited not to exceed a given sum, the same duty shall be paid as on a mortgage for such limited sum, it must have been contemplated that the sum should be limited by the deed itself, for it could not otherwise be known what duty was to be imposed pursuant to the clause. It seems to me, therefore, that the preceding branch of the schedule, which provides for cases where the total amount is without any limit, must, upon a sound construction, be understood in the same manner as referring to a limitation on the face of the deed. If none appears there, there is no limitation at all, within the meaning of the schedule.

PARKE, J. I am of the same opinion, though I come to the conclusion with reluctance : and as no limit can be assigned to the sum secured in this case without looking further than the deed itself, the security must be considered as falling within the clause which imposes the larger duty.

TAUNTON, J., and PATTESON, J., concurred.

Rule discharged.

*811] *LITTLEFIELD, Executrix of JOHN LITTLEFIELD, v. ELIZABETH SHEE. *Nov. 4.*

Declaration stated that the plaintiff had supplied goods to Elizabeth S. for the sum of 16*l.*, and in consideration of the premises and of the said sum being unpaid, E. S. afterwards promised to pay as soon as it was in her power. Averment, that though it was afterwards in her power, she refused. The proof was, that the goods were supplied to her while she was a feme covert, living apart from her husband, and that she, after his death, promised to pay :

Held, that as the price of the goods originally constituted a debt from the husband, and not from the defendant, the ground of the supposed moral obligation on which the assumpsit proceeded was not properly set out in the declaration, and therefore the plaintiff could not recover.

Semble, that a moral obligation is not in every case a sufficient consideration for a promise.

ASSUMPSIT for goods sold and delivered. The fourth count stated that John Littlefield, in his lifetime, at the special instance and request of the defendant, had supplied and delivered to *her* divers goods and chattels for the sum of 16*l.* ; and, thereupon, in consideration of the premises, and of the said sum of money being due and unpaid, the defendant, after the death of the said John Littlefield, undertook and promised the plaintiff as executrix of J. L., to pay her the said sum of money as soon as it was in her (the defendant's) power so to do ; and, although afterwards, to wit, on, &c., at, &c., it was in her power to pay the said sum, yet she did not do so. Plea, the general issue. At the trial before Gaselee, J., at the last assizes for Sussex, it appeared that the action was brought to recover 15*l.* for butcher's meat supplied by the testator to the defendant, for her own use, between September 1825 and March 1826. During that time the defendant was a married woman, but her husband was abroad. After his death she promised to pay the debt when it should be in her power,

and her ability to pay was proved at the trial. The learned Judge held, that the defendant having been a feme covert at the time when the goods were supplied, her husband was originally liable, and, consequently, there was no consideration for the promise *declared upon. The plaintiff was therefore nonsuited. *Hutchinson* on a former day in this term moved to set aside [*812 the nonsuit, and to enter a verdict for the plaintiff on the fourth count; on the ground that, the goods having been supplied to the defendant while she was living separate from her husband, she was under a moral obligation to pay for them, and such obligation was a sufficient consideration for a subsequent promise. It was not necessary that there should have been an antecedent legal obligation. *Barnes v. Hedley*, 2 Taunt. 184, *Lee v. Muggeridge*, 5 Taunt. 36. *Cur. adv. vult.*

Lord TENTERDEN, C. J., now delivered the judgment of the Court. The fourth count of the declaration states, that the testator had, at the request of the defendant, supplied *her* with goods, and that in consideration of the premises, and of the price of the goods being due and unpaid, the defendant promised. Now, that is in substance an allegation that those sums were due from her, and the plaintiff failed in proof of that allegation, because it appeared that the goods were supplied to her whilst her husband was living, so that the price constituted a debt due from him. We are, therefore, of opinion that the declaration was not supported by the proof, and that the nonsuit was right. In *Lee v. Muggeridge*, 5 Taunt. 36, all the circumstances which showed that the money was, in conscience, due from the defendant, were correctly set forth in the declaration. It there appeared upon the record, that the money was lent to her, though paid to her son-in-law, while she was a married woman, and that after her husband's death, she, knowing all the *circumstances, promised that her executor should pay the sum due on the bond. I must also observe, [*813 that the doctrine that a moral obligation is a sufficient consideration for a subsequent promise, is one which should be received with some limitation. (a)

Rule refused.

(a) See the note on *Wennell v. Adney*, 3 B. & P. 249, and 2 Wms. Saund. 137 d, note (b).

The KING v. The Inhabitants of LANCASHIRE. Nov. 4.

By the statute 43 G. 3, c. 59, s. 5, no bridge thereafter to be erected or built, is to be repairable at the expense of the county, unless erected under the direction of the county surveyor, &c. This applies only to bridges newly built, not to a bridge merely widened or repaired since the passing of the act.

Trustees under a turnpike act having built a bridge across a stream, where a culvert would have been sufficient, but a bridge is better for the public, the county cannot refuse to repair such bridge on the ground that it was not absolutely necessary.

INDICTMENT for not repairing Leigh Bridge, situate in the highway from Manchester to Wilmslow. Plea, not guilty. At the trial before Parke, J., at the Lancaster summer assizes, 1831, it appeared that the bridge, which was a carriage bridge, had been widened subsequently to the passing of the statute 43 G. 3, c. 59, by the trustees of the turnpike road between Manchester and Wilmslow. The bridge was originally built by them; but had not before been chargeable to the county. The statutes under which they acted gave them a discretionary power to erect bridges; and the funds of the trust were made applicable to the repairs. The public had used the bridge in its present state for a number of years. It was urged on behalf of the defendants, that the alteration in the width of the bridge rendered it a new bridge, and consequently brought it within the fifth section of 43 G. 3, c. 59, which exempts counties from repairing bridges erected after the passing of the act, unless built under the direction of the county surveyor, or a person appointed by the justices at

*814] *Sessions: (a) and that this structure, not having been made under such direction, was not repairable by the inhabitants. The learned judge reserved the point; and the jury, in answer to questions proposed by him in his summing-up, found, that it was necessary to have a bridge or culvert for the passage of a stream at the place in question; that a bridge was better for the public; but that a culvert would suffice, and would be beneficial. A verdict of guilty having been taken,

Starkie now moved for a rule to show cause why a verdict of acquittal should not be entered. This is, substantially, a bridge erected since the passing of the act 43 G. 3, c. 59. It cannot be said that *this bridge*, which the county is called upon to repair, existed at that time. The inhabitants of a county are not obliged to widen a bridge; *Rex v. The Inhabitants of Devon*, 4 B. & C. 670. In that case the widening is, by two of the judges, put upon the same footing as the making of a new bridge. *Bayley, J.*, says there, "I am of opinion, that *815] as a county is not bound to make a bridge, it is not bound to widen *one: quoad the addition, that would be a making; because the addition beyond the existing width, would be pro tanto a new bridge." But further, it has been found by the jury that a culvert in this place would have been sufficient. Evidence was given at the trial that it would have been equally beneficial with a bridge; and, at all events, the county ought not to be put to the expense of doing more than is necessary for the public use. No argument can be drawn from the acquiescence of the inhabitants in the construction of a bridge; for that was done under the powers granted by the local act; they could not therefore interfere. [Lord TENTERDEN, C. J. Nor could they, if an individual had built it.] If an individual erects an unnecessary bridge, it may be indicted as a nuisance. *Rex v. The West Riding of Yorkshire*, 2 East, 342. [Lord TENTERDEN, C. J. The words of Lord Ellenborough there are, "If it be built in a slight or incommodious manner, no person can, at his choice, impose such a burden on the county; and it may be treated altogether as a nuisance, and indicted as such."]

Lord TENTERDEN, C. J. On the point reserved in this case, I am of opinion that the defendants are not entitled to a verdict. Before the statute 43 G. 3, c. 59, the county was obliged to repair bridges by whomsoever built, if they were beneficial to the public. The fifth section of the act was framed for the more clearly ascertaining the description of bridges thereafter to be erected, which inhabitants of counties should be bound to repair and maintain: and it provides *816] "that no bridge hereafter to be erected or built in any county," *shall be repairable at the expense of the inhabitants, unless erected under such superintendence as is there pointed out. But the case of a bridge widened, as in the present instance, appears not to have occurred to the legislature; at all events, it is not within the words of the section. As to the special finding of the jury, it may be, that some persons thought a culvert as beneficial to the public as a bridge, but the jury thought a bridge was better, and that being their opinion, I think the verdict was right.

LITLEDALE, J. I think the act 43 G. 3, c. 59, s. 5, does not apply to this case. The bridge existed and was used by the public before the passing of the act, and the county were at that time liable to repair it. The trustees widened it after the act came in force, but it continued the same bridge. The statute only applies to bridges newly erected after its passing. As to the other point, if

(a) The words of the statute s. 5, are, "And for the more clearly ascertaining the description of bridges hereafter to be erected, which inhabitants of counties shall and may be bound or liable to repair and maintain, be it further enacted, that no bridge hereafter to be erected or built in any county, by or at the expense of any individual or private person or persons, body politic or corporate, shall be deemed or taken to be a county bridge, or a bridge which the inhabitants of any county shall be compellable or liable to maintain or repair, unless such bridge shall be erected in a substantial and commodious manner, under the direction or to the satisfaction of the county surveyor, or person appointed by the justices of the peace at their general quarter sessions assembled, or by the justices of the peace of the county of Lancaster, at their annual general sessions: and which surveyor, or person so appointed, is hereby required to superintend and inspect the erection of such bridge, when thereunto requested by the party or parties desirous of erecting the same."

the jury were of opinion that a bridge was better than a culvert, I think the verdict was proper.

PARKE, J. I am also of opinion, that the statute applies only to new bridges, and not to those repaired or widened. As to the comparative advantages of a bridge or a culvert, I think the jury came to a right conclusion on the evidence, and that the verdict ought not now to be disturbed.

TAUNTON, J. I am of the same opinion. The enlargement of the bridge did not destroy its identity. It was the same bridge, though wider.

Rule refused.

*MOORE v. ROBINSON. Nov. 5.

[*817]

A master of a fly-boat, who is hired by a canal company at weekly wages, may maintain trespass for cutting a rope fastened to the vessel, whereby it was being towed along an inland navigation, although the vessel and the rope were the property of the company.

TRESPASS for cutting a rope of the plaintiff, fastened to a vessel of the plaintiff, for the purpose of hauling and towing the same, and by which the said vessel was hauled and towed along the river Aire. Plea, not guilty, and a justification. At the trial before Parke, J., at the last Summer assizes for Yorkshire, it appeared that the rope in question was part of the tackle belonging to a fly-boat which plied on the Aire and Calder navigation, and was the property of that navigation company; and that the plaintiff was employed by the company to navigate the boat at weekly wages, and had a mate under him in the management of the boat, whom he hired and paid. It was objected that the plaintiff had not such an interest in the boat and its tackle as would enable him to maintain trespass. But the case of *Pitts v. Gaince*, 1 Salk. 10, was cited, where Lord Holt said, that the master of a ship might maintain trespass, as the bailiff of goods might. The learned Judge allowed the trial to proceed, giving the defendant liberty to move to enter a nonsuit, and the jury found a verdict for the plaintiff.

Blackburne moved accordingly to enter a nonsuit. *Pitts v. Gaince* is distinguishable from the present case, because there Lord Holt was speaking of the master of a ship, laden, and ready to sail for Dantzick. It may be necessary that the master of a vessel navigating to foreign parts should have such full powers and *authority as may confer upon him a possessory interest therein. But that is not so in the case of a mere boat plying on a canal, [*818 where there does not exist such a necessity. [LITTLEDALE, J. Could the master of a vessel employed in the coasting trade maintain trespass?] It may be difficult to draw the exact line. Here, however, the plaintiff was but a mere servant, like the carter who drives a cart.

Per Curiam. The plaintiff was intrusted with the management of the vessel, and had a person under him. The cases are not distinguishable.

Rule refused.

The KING v. The Justices of MIDDLESEX. Nov. 16.

Where two acts of parliament, which passed during the same session and were to come into operation the same day, are repugnant to each other, that which last received the royal assent must prevail, and be considered pro tanto a repeal of the other.

BEFORE the statute 10 G. 4, c. ci., the highways of St. James's, Clerkenwell, were by certain local acts of parliament placed under the management of trustees or commissioners. That statute, which was passed to amend the former acts, by section 41 enacted, that from and after the commencement of that act, the trus-

tees or commissioners of the turnpike roads within St. James's, Clerkenwell, should be discharged from the repair of the roads lying wholly within St. James's, and the said roads should from thenceforth cease to belong to the said turnpike roads, or to be under the control or management of the said trustees, and should from time to time thereafter be repaired, maintained, supported, kept in repair, and watered by the commissioners for executing the said recited acts and that act. The act 10 G. 4, c. ci., was to commence and take effect on the *819] 1st of January, *1830, and received the royal assent on the 1st of June, 1829. By s. 7 & 8 of another act of the 10 G. 4, c. lix. (for consolidating the trusts of the turnpike roads near the metropolis, north of the Thames), which received the royal assent on the 19th of June, 1829, it was enacted, that from and after the 1st of January, 1830, the roads therein particularly mentioned (including the roads in question) should cease to be maintained and repaired, watched, watered, or lighted by the commissioners then acting, and should from thenceforth be deemed and considered to be common highways, and should from thenceforth be maintained, repaired, watched, watered, and lighted by the parishes in which the same were respectively situate, by the respective surveyors or persons appointed under and by virtue of the general act of the 13 G. 3, c. 78. A rule nisi having been obtained for a mandamus directed to the justices of Middlesex, commanding them to appoint a surveyor of the highways of St. James's, Clerkenwell, pursuant to the provisions of the 13 G. 3, c. 78,

French, on a former day in this term, showed cause. The question is, if two contradictory acts are passed in the same session of parliament, to come into operation on the same day, which is to take effect? The time at which the royal assent is given is a mere accident. In the absence of any other criterion, the intention of the legislature must decide; and that is to be collected from a comparison of the statutes themselves, and a consideration of the objects proposed by them, and of the manner in which they may best be made available for the public good. (He then contended, that on this view of the acts, that of 10 G. 4, c. ci., ought to prevail.)

*820] **F. Pollock and Bodkin, contra.* The two acts containing opposite provisions, that which last received the royal assent must be considered as virtually repealing the other. In the *Attorney-General v. The Chelsea Water Works Company*, Fitzgibbon, 195 (cited 2 Darris on Statutes, 675), it was held by all the Barons of the Exchequer, that where the proviso of an act of parliament is directly repugnant to the purview, the proviso shall stand, and be a repeal of the purview, as it speaks the last intention of the makers; and it was compared at the bar to a will, in which the latter part, if inconsistent with the former, shall supersede and revoke it. The decision there was, that one part of the same act may virtually repeal the other; à fortiori a subsequent act, passed in the same session, may repeal a former. [*French.* It is observed in 2 Darris, 672, that "an act cannot be altered or repealed in the same session in which it is passed, unless there be a clause inserted, expressly reserving a power to do so." *PARKE, J.* No authority is cited; though the practice in parliament certainly is as there stated. *LORD TENTERDEN, C. J.* And such clauses are not uncommon.]

Cur. adv. vult.

LORD TENTERDEN, C. J., now delivered the judgment of the Court.

We are of opinion that this rule must be made absolute. It was objected, that by the local act of the 10 G. 4, c. ci., s. 41, the roads were "to be repaired, maintained, supported, kept in repair, and watered," by certain commissioners, and that that act ought to prevail although another act (the 10 G. 4, c. lix.) *821] passed *subsequently, but in the same session, called the "Metropolitan Road Act," directs that the maintaining, repairing, watching, watering, and lighting of the roads in question shall be by the parishes in which the same are respectively situate, by surveyors appointed pursuant to the provisions of the statute 13 G. 3, c. 78. The effect of that enactment therefore is, to place the repairing of the same roads under the management of the surveyors of the highways. And in that respect, those acts are undoubtedly repugnant to each other.

As to repairing the roads, we are therefore of opinion that the act which last received the royal assent must prevail. Our decision is conformable with the doctrine laid down in the *Attorney-General v. The Chelsea Water Works Company*; there it was resolved, that where the proviso of an act of parliament is directly repugnant to the purview of it, the proviso shall stand, and be held a repeal of the purview, *as it speaks the last intention of the makers*. At the time when that resolution was come to, if two acts of parliament, passed in the same session, were repugnant, it was not possible to know which of them received the royal assent first, for there was then no endorsement on the roll, of the day on which bills received the royal assent, and all acts passed in the same session were considered as having received the royal assent on the same day, and were referred to the first day of the session. Now, however, it is known on what day each bill receives the royal assent, it being provided by the 33 G. 3, c. 13, that a certain parliamentary officer shall endorse on every act of parliament "the day, month, and year when the same shall have passed and shall have received the royal assent; and such endorsement shall be taken to be a part of such act, and to be the date of its *commencement, where no other commencement shall be therein provided." It appears that, in this case, the metropolitan act received the royal assent a few days after the local act, and consequently, we are of opinion that so far as the two acts are contradictory to each other, the metropolitan act, which last received the royal assent, must have the effect of repealing the other. The rule, therefore, for a mandamus must be made absolute.

Rule absolute.

WILLIAM ROSE and EDWARD SHEATE WHITE v. CORNELIUS POULTON and Others, Executors of JOSEPH POULTON. Nov. 11.

By an indenture between A., and B. and his wife, and C. of one part, and D., and E. and the same C. of another part, it was recited, that F., also party to the deed, had requested to have a certain farm given up to him, in which B.'s wife was interested, he F. giving sureties, namely, the said D., E., and C., for payment of an annuity to B.'s wife; and it was thereupon witnessed that, in consideration of the covenants thereafter entered into by A., B. and his wife, and C. and of 10s., the said D., E., and C., and each and every of them, covenanted with A., B. and his wife, and C. to pay the annuity. There followed covenants by A., B. for himself and his wife, and C., severally, for quiet enjoyment, and for executing an assignment to F. when required. The deed was signed and sealed by D., E., and C., and by F., but not by A. or B. In an action brought by A. and B. after the death of C. for breach of the covenant to pay the annuity: Held,

First, that the omission of A. and B. to execute the deed did not disable them from suing upon it; that such omission did not amount to a total failure of consideration for the covenant sued upon (supposing such total failure to be an answer to the action), and that the covenant to pay the annuity, and those for quiet enjoyment and for assigning, were not mutual and dependent. Secondly, that at least after C.'s death, A. and B. might sue D.'s executors (D. and E. being also dead) for non-payment of the annuity, though the covenant for such payment was entered into both by and to C.

THE plaintiffs declared in covenant upon an indenture made between Charles Stevens, of the first part; Joseph Poulton, the testator, Charles Poulton, since deceased, and James Gurney, since deceased, of the second part; and William Rose, one of plaintiffs, Frances Rose (late Stevens), his wife, since deceased, Edward Sheate White, the other plaintiff, and the said James Gurney, of the third part; which indenture, sealed with the seals of Charles Stevens, and of Joseph and Charles Poulton and *James Gurney, the plaintiffs brought into court: and the declaration stated that by the said indenture the said Joseph and Charles Poulton, and, it was therein alleged, the said James Gurney, all since deceased, at the request of the said Charles Stevens (testified by his becoming a party to the instrument), did, and each and every of them, did covenant to and with the plaintiffs and the said Francis Rose, and, it was in the said indenture alleged, the said James Gurney, that Stevens should pay an

annuity to William and Frances Rose half-yearly, during the life of Frances, and should make a certain proportional payment, in respect of such annuity, to William Rose, if he survived Frances, and she died during the half year. Breach, non-payment of the annuity and of the proportional sum after the death of Frances. The defendants, after praying oyer of the deed, which was accordingly set out, pleaded several pleas, averring that the plaintiffs Rose and White never executed, nor did either of them ever execute the supposed indenture or any counterpart thereof; and as a further plea, that James Gurney in the indenture described as of the second part, and James Gurney therein described as of the third part, were one and the same person; and that the said James Gurney did, in the lifetime of all the parties, execute, seal, and deliver the said indenture, and become a party thereto. To these pleas there was a general demurrer. Joinder in demurrer.

The indenture set out on oyer recited the will of Thomas Stevens, the first husband of the said Frances Rose, whereby he bequeathed the stock, crops, &c., of a certain farm holden by him, to the said Frances, the said Edward Sheate White, and the said James Gurney (whom he appointed his executrix and executors), in trust that White and Gurney should permit

*824] Frances to *hold and enjoy the same as in the will was directed; and

there was a codicil, also set out, directing that if Frances should marry again, she should immediately give up the farm to the testator's son, the said Charles Stevens, on the terms, and provided, that he should secure to her an annuity of 20*l.* during her life, and give security to the trustees for payment of certain legacies left in the will. It was then further recited that the said Frances had, since the testator's death, intermarried with the said William Rose, and that Charles Stevens, the son, had thereupon requested Rose and his wife, and the said E. S. White and James Gurney, to surrender the farm to him, upon Joseph and Charles Poulton and James Gurney becoming sureties to them for the payment of the annuity and fulfilment of the other terms of the will; to which request they the said W. Rose and Frances his wife, E. S. White and James Gurney, "had mutually consented and agreed." And it was therefore witnessed by the said indenture that "in consideration of the covenants thereafter entered into by the said William Rose and Frances his wife, E. S. White and James Gurney, and in further consideration of the sum of ten shillings" by them or one of them paid to each of them the said Joseph Poulton, Charles Poulton, and James Gurney, the receipt of which they respectively acknowledged, they the said J. and C. Poulton and James Gurney, at the request of the said Charles Stevens, testified by his executing the indenture, did, and each and every of them did covenant to and with Rose and his wife, White, and James Gurney, and each of them, that Stevens should pay the said annuity of 20*l.* to Rose and his wife, and a proportional sum to Rose in case of his wife's dying in

*825] the course of the half year, and his surviving *her, and should also fulfil the other directions of the will. It was further witnessed that Rose for himself and his wife, and also E. S. White and James Gurney, each and every of them for himself only, did covenant to and with Charles Stevens, and to and with J. and C. Poulton, and James Gurney, that Stevens should quietly enjoy the farm, &c., without interruption from Rose and his wife, White and James Gurney, or any or either of them, or any claiming under them, and that Rose and his wife, White and James Gurney, would execute an assignment of the lease to Stevens when required. The deed was signed and sealed by Charles Stevens, J. and C. Poulton, and James Gurney, but by no other person.

R. Bayly in support of the demurrer. It is no objection to the right of the plaintiffs to recover, that they did not execute the deed. "If one party executes his part of an indenture, it shall be his deed, though the other does not execute his part." Com. Dig. *Fait*, (C) 2. Parties named with others in a covenant as covenantees, although they did not seal, may join in an action, *Vernon v. Jefferys*, 2 Stra. 1146; and those who may, must join, *Petrie v. Bury*, 3 B. & C 353. (Here he was stopped by the Court.)

Richards, contrà. The covenants by Joseph and Charles Poulton and James Gurney, were in consideration of the covenants after mentioned, which were to be entered into by William and Francis Rose, White, and Gurney, for securing possession of the farm to Stevens. Those covenants never having been entered into, the consideration fails; and it is laid down in Com. Dig. *Covenant*, (F), that "If the foundation of the covenant fails, the covenant also fails: as, if a lease be *agreed on and the lessee executes his part, but the lessor does not execute his part, whereby there is not any lease; the covenants in [*826 the indenture sealed by the lessee, and also the bond for performance of covenants, are void;" to which point *Soprani v. Skurro*, Yelv. 18, is cited, and that case was recognised in *Capenhurst v. Capenhurst*, Sir T. Ray. 27. In *Glazebrook v. Woodrow*, 8 T. R. 366, the plaintiff covenanted to convey his property in a school-house to the defendant on or before the 1st of August, 1797, and to surrender the same on or before the 24th of June, 1796, and in consideration thereof, the defendant covenanted to pay him 120*l.* on or before the said 1st of August. The plaintiff sued the defendant for non-payment of the money, but it appearing that the plaintiff himself had not executed a conveyance of the property (though he had delivered possession), it was held that he could not recover. So here, the parties whom the defendant represents, entered into a covenant for payment of an annuity, but nothing has been executed by the other parties to give him a cross-remedy for any failure in what was to be performed by them. It is not even averred in the declaration that Stevens had possession of the property, or derived any benefit whatever from the deed. It may be that Rose and White refused to execute the deed; and, in such a case, the Court would surely not enforce it in their favour against the other parties.

The other objection is, that James Gurney, who is one of the covenantors in this deed, is also a covenantee: and it is well established that a man cannot sue himself, *Moffat v. Van Millingen*, 2 B. & P. 124, n. (c), *Bosanquet v. Wray*, 6 Taunt. 597. It is true, Gurney is dead, but that can *make no difference. [*827 This deed was to secure an annuity for the life of Frances Rose; its validity, or capability of being enforced, cannot have been meant to depend on the life of any of the other parties. [Lord TENTERDEN, C. J. The covenant is joint and several. Why should not any of the covenantees sue alone? PARKE, J. Or all the covenantees sue a single covenantor?] *De Tastet v. Shaw*, 1 B. & A. 664, is an authority against such an action. [PARKE, J. There the covenantees were jointly interested. If in that case a surety had been introduced, who had bound himself jointly and severally with the covenantor, the question would have been like the present.] Even in such a case, if one covenantor were sued and compelled to pay damages, he would be entitled to contribution from the others: so that a covenantee, situated as Gurney was here, would, on the one hand, be suing a party who was surety together with himself, and on the other, would be liable to such surety for contribution. And this was a reason assigned, in *Teague v. Hubbard*, 8 B. & C. 345, for the judgment of the Court, that an endorsee, member of a company, could not recover upon bills of exchange against the drawer, who was also a member. It cannot be argued that the plaintiffs, by rejecting Gurney as a covenantor, could deprive the other parties of their right to contribution from him. It is true, Gurney is now dead, but the argument on the other side, if maintainable, must go the whole length of showing that, even in his lifetime, his covenant might have been left out of consideration. [PARKE, J. If this could *not be done in his lifetime, it does not follow [*828 that it might not after his death, *Richards v. Richards*, ante, 447.]

R. Bayly, in reply. It is true, as laid down in the cases which have been cited, that a man cannot sue himself. But neither can he covenant with himself; and, therefore, the supposed covenant to which Gurney is a party might be treated as a nullity as far as he was concerned. The declaration meets this view of the case. As to the objection, that the plaintiff did not execute the indenture, the consideration for the present covenant is, in substance, that Rose and his wife, White, and Gurney, had assented to Stevens's request to have the

farm surrendered up to him. It is a past consideration; that in *Glazebrook v. Woodrow*, 8 T. R. 366, was future, and never took effect; and there is the same distinction between the present case and others which have been cited. Any objection, merely founded on the non-joinder of one covenantee, should have been taken in abatement.

Lord TENTERDEN, C. J. I am of opinion that the plaintiff is entitled to judgment. The first objection to his claim is, in substance, that there has been a failure of consideration for the covenant on which this action is brought. Whether an entire failure of consideration will in all cases relieve a party from the obligation of his deed, it is not necessary at present to inquire. In the case of a lease not executed by the lessor, it certainly does, because, in default of such execution, there is no lease. But here the whole consideration has not

*829] failed. *The deed set out on oyer recites, that Stevens had applied to Rose and his wife, White and Gurney, to surrender the farm to him, upon security given for payment of the annuity, and that they had consented and agreed. This agreement is, in fact, part of the consideration. In the deed it is certainly expressed, that the covenants made by the Poultons, together with Gurney, are in consideration of the covenants entered into by Rose and his wife, White and Gurney, and of 10s. It would have been more artificial to say, "in consideration of the premises, and of 10s.;" but the meaning is clear. The cases cited, in which covenants have been entered into in contemplation of a lease to be granted, do not apply: here the covenantors have in part had the benefit of the consideration. It cannot be said that the whole has failed, because a covenant for quiet enjoyment was not duly executed. Then as to the second point. The covenant on which this action is brought was made to Rose and his wife, White and Gurney, jointly and severally. The action is brought by Rose and White jointly; they, therefore, treat it as a joint covenant: if it were several they could not sue together. But, considering the covenant as joint, no objection arises from Gurney having been a party to it, though he was also a covenantor. His death removes any difficulty as to contribution, and leaves no incongruity in point of form. The case is not so strong as that of *Richards v. Richards*, antè, 447; for it was held there, that a married woman, to whom a joint and several note had been given by her husband and two other persons, might, on his death, sue the other parties upon it; and, further, that

*830] the statute of *limitations did not begin to run against the claim till after the husband was dead.

PARKE, J. As to the objection that the covenantors (with the exception of Gurney) never executed the indenture; in *Clement v. Henley*, 2 Roll. Ab. *Faits*, (F.) 2, it was held too clear for argument, that if an indenture of charter party is made between A. and B., on the one part, and C. and D., on the other, and there are covenants on each side, and A. alone seals on the one part, and C. and D. on the other, but it is expressed throughout the indenture that A. and B. covenant and are covenanted with, in such a case A. and B. may join in an action against C. and D. for breach of one of the covenants. But a difficulty is suggested here, because the covenant sued upon is made in consideration of the covenants thereafter entered into by the other parties. This, however, is giving to a "consideration" the effect of a condition; an operation which that word clearly ought not to have. In actions upon instruments under seal, the consideration is not material; and, at all events, in this case, it has not totally failed. If the present objection prevailed, there is hardly any case in which a deed is set out on oyer, where the plaintiff could succeed if he did not distinctly aver that all the covenants on his part had been fulfilled. With regard to the other objection; this is a covenant made to the covenantees jointly and severally. The present plaintiffs and Gurney had, in fact, no joint interest of their own: if they sued together, they could do so only as trustees for the person really concerned; and I do not see why such an action might not have been brought by the

*831] three trustees in the lifetime of Gurney. But, he being dead, the case falls within the authority of *Richards v. Richards*, antè, 447.

TAUNTON, J. There is a well known distinction between cases where the consideration for doing a thing is the doing of some other thing, and where it is merely the covenanting to do such thing. *Glazebrook v. Woodrow*, 8 T. R. 366, was a case of the former kind; and the covenants there were considered as mutually dependent. But in this indenture the covenantors bind themselves in consideration of the covenants thereafter entered into by the other parties, and of ten shillings. The "covenants thereafter entered into" were not a condition precedent, but were independent covenants; and there was not a total failure of consideration; at least the ten shillings were received. As to the second point, I think no objection arises from Gurney being one of the covenantees. Taking the covenant as one made to them jointly, upon his death the remedy survives to the other two; and there is then no incongruity in their availing themselves of the joint remedy, though against parties with whom Gurney joined as a covenantor.

PATTERSON, J. I am of opinion that there was not a total failure of consideration between these parties; and if there had been, the cases cited on that head do not apply: for they are all cases in which a lease was in contemplation, and where, in consequence of the non-execution, the relation of landlord and tenant never was *created. In *Glazebrook v. Woodrow* the cove- [*832]nants were mutual and dependent: here the very expression, "in consideration of the covenants hereinafter entered into," excludes the supposition that anything future was in contemplation, on which the performance by the Poultons and Gurney of their covenants was to depend. I do not see, therefore, how it is possible to say that the covenants in this deed were mutual and dependent. On the other point, I think no objection arises to this action from Gurney having been a covenantor as well as covenantee, for the reasons already given.

Judgment for the plaintiffs.

***JEFFERYS, Gent., one, &c., v. GURR, Treasurer of the Guardians [*833
of CHATHAM Poor. Nov. 11.**

By an act, 42 G. 3, c. 56, for enlarging the poor-house of the parish of Chatham, certain persons therein named, and their successors, were appointed guardians of the poor in C., and trustees for putting the act in execution; and in order that there might be an impartial succession of guardians, and to keep up the specified number, it was provided, that eight should go out of office yearly, and that the parishioners should re-elect the same persons, or other inhabitants of the parish in their stead. By other sections the guardians were empowered to raise money by mortgage or grant of annuity, to purchase land, and to take a conveyance to themselves and their successors: and they were to sue and be sued in the name of their treasurer for the time being, who was to be reimbursed by the guardians all costs and damages to which he should be put as plaintiff or defendant in such action.

A. was treasurer to the said guardians under the provisions of the act from 1805 till 1811, and from 1811 to 1828.

By a decree of the Court of Chancery in 1808, the parish of C. was adjudged to be entitled, in respect of such part of it as was within the city of Rochester, to two thirty-second parts of certain revenues bequeathed for the use of the poor of that city, and a sum of 1115*l.* was paid over to A. as such treasurer, on that account. That sum he, by order of the then guardians, paid over to them in 1822, and they applied it to the use of the poor of the whole parish. On the petition of the inhabitants of that part of the parish which was within the city of Rochester, the plaintiff, after he ceased to be treasurer, was ordered by the Court of Chancery to pay the above-mentioned sum which he had received as treasurer, into Court, in order that it might be applied to the exclusive use of Chatham *infra*. He accordingly paid the amount, and brought an action against the guardians to recover it:

Held, that the guardians were, for the purposes of suing or being sued, in the nature of a corporation, and that A. was entitled to recover in an action against the now treasurer the sum paid by him into the Court of Chancery, as money paid to the use of the guardians.

ASSUMPSIT for money lent to the guardians of Chatham poor by the plaintiff; and for money paid for their use, and had and received by them for the plaintiff's use. Plea, the general issue. At the trial before Alexander, C. B., at the Spring assizes for the county of Kent 1829, a verdict was entered for the plaintiff for 1115*l.* 12*s.* 4*d.*, subject to the opinion of this Court on the following case:—

R. Watts, by his will, dated 1579, left certain moneys to be placed out at interest by the mayor and citizens of Rochester, and the interests and profits to be employed for the support and augmentation of an almshouse then erecting in that city, and *834] for the reception and relief of *poor travellers in the said house. And further, to support the said house, and to purchase stuff to set the poor of the city to work, he gave the mayor and citizens all other his lands, tenements, and estates for ever. The revenues of the charity having increased, the parishes of St. Margaret and Strood, which were partly within the liberties and precincts of Rochester, in the year 1672 complained in Chancery that they had no share of Mr. Watts's charity, and upon that complaint, were adjudged by the Court to be entitled to a certain share of the rents and profits arising, and to arise, from the said estates. In 1802, an act of parliament was passed (42 G. 3, c. 56, public local act), for the better relief of the poor of the parish of Chatham, which act nominated and appointed certain persons and their successors (to be elected as therein mentioned), guardians of the poor of the said parish, and trustees for putting that act in execution.(a) In May 1805, the plaintiff was duly *835] *elected treasurer to the guardians of the poor pursuant to the act, and continued to hold that office till the 1st of June, 1811. In May 1820 *836] he was again elected *treasurer, and he continued in that office till the 24th of April, 1828, when he resigned, and was succeeded by the defendant, who, at the time when this action was brought, continued to be treasurer.

(a) By section 1, the perpetual curate of the parish of Chatham, such justices of the peace for the county of Kent as should be resident in the said parish, the lord or lady of the manor and hundred of Chatham, the resident commissioner of his Majesty's dock-yard in the said parish, the resident storekeeper of his Majesty's ordnance, the high constable of and for the manor and hundred of Chatham, and the churchwardens and overseers of the poor of the said parish, and every and each of them respectively for the time being, and twenty-four other persons therein named, and their successors (to be elected in manner thereafter mentioned), were nominated and appointed guardians of the poor of the parish of Chatham, and trustees for putting the act in execution.

By sect. 2, that there might be an impartial succession of guardians chosen out of the inhabitants of the said parish, and in order to keep up the number of twenty-four (exclusive of the persons who were to be guardians in right of their office or station), it was further enacted, that eight should go out yearly, and the parishioners should either re-elect the same persons or other persons, inhabitants of the parish, in their stead, who should be joined with the remaining guardians, and have the same power and authority.

Sect. 4 provided for supplying vacancies by death of any guardian or his leaving the parish, &c., and for regulating the elections.

By sect. 8, all messuages, lands, &c., goods, chattels, and effects which the minister, churchwardens and overseers, or other persons were entitled to or possessed of in trust for the parishioners for the use of the poor, were, after the passing of that act, in like manner to be possessed by and belong to the guardians upon the trusts in that act contained.

By sect. 9, lands and money coming to the churchwardens or overseers, or to trustees, for the use of the poor, by any will or deed, were to be conveyed, assigned, and paid to the guardians or their treasurer, to be applied to the appointed uses, provided that the guardians might permit the then trustees, treasurers, &c., to continue in the management of any trust estate or fund, for such time as the guardians and their successors should think fit.

By sect. 18, the guardians were empowered by writing under their hands to direct the treasurer from time to time to pay all sums of money by him received on account of the poor's rate, or on account of the poor of the said parish, and applicable to the relief thereof, to such persons and in such manner as they should think necessary and expedient for the purposes of the act; and the treasurer was authorized and required to pay the same accordingly; which sums so paid should be allowed him in his accounts.

By section 27, the guardians were authorized to purchase lands, not exceeding two acres, and to take a conveyance thereof to them and their successors, and to erect a work-house thereon.

Sect. 28 enabled them to take grants of waste lands for the benefit of the poor, to the guardians and their successors for ever.

And by sect. 32, they might contract (in writing) for the adding to, altering, repairing, or furnishing any poor-house or work-house for the parish.

By sect. 36, they were authorized to borrow money by mortgage of the before-mentioned estates and the poor's rates. And by sect. 37, to grant annuities for the purposes mentioned in the act, such annuities to be paid out of the rates thereinbefore mentioned.

By sect. 39, it was enacted, that the guardians might sue and be sued in the name of their treasurer for the time being, provided that every such treasurer, in whose name the action or suit should be commenced, prosecuted, or defended, should always be reimbursed and paid out of the moneys to be received by the guardians by virtue of that act, all such costs, charges, damages, and expenses as he should be put to or become chargeable with by reason of his being so made plaintiff or defendant.

In June 1808, the plaintiff, pursuant to the resolution and order in writing of the then guardians of the poor, and as their treasurer (he also acting as their solicitor in the matter), filed an information in Chancery in the name of the then Attorney-General on his, the plaintiff's, relation as such treasurer, against the mayor and citizens of Rochester, and the churchwardens and overseers of the poor of the parishes of St. Nicholas, St. Margaret, and Strood, praying to participate in the rents and profits of Watts's charity in respect of so much of the said parish of Chatham as was within the liberties, &c., of Rochester; and by a decree thereupon made, the parish were adjudged to be entitled to two thirty-second parts of the aforesaid rents and profits; and by two orders of the Vice-Chancellor in the suit, made 11th of March and 27th of July, 1822, the sums of 620*l.* 18*s.* and 494*l.* 14*s.* 4*d.*, being respectively two thirty-second parts of sums accumulated from the annual revenues of the charity, were ordered to be paid to the treasurer of the guardians of the poor of the parish of Chatham, the former sum out of the funds then in court, and the latter out of the funds then in the hands of the mayor and citizens. The plaintiff, as treasurer of the guardians, received the sums out of court, and from the mayor and citizens of Rochester, in July and September 1822.

In October 1822 the inhabitants of that part of the parish of Chatham which lies within the limits of the city of Rochester, and is called Chatham *intra*, gave a notice *to the guardians of the poor of the parish of Chatham for the time being, and the plaintiff as their treasurer, to apply the whole of the moneys received and to be received by them in respect of Watts's charity to the exclusive benefit of that part of the parish of Chatham lying within Rochester, and not for the benefit of the parish at large. The guardians, at a meeting held in December 1822, required the plaintiff to pay over to them the sums so by him received; and the plaintiff thereupon apprised them of the notice he had received, but the guardians insisted on his paying over the moneys as required by them. The plaintiff then requested the guardians, in case of his paying over the moneys, to set them apart, or invest them as they should think proper, until the question of their application should be settled; but the guardians refused to do either, and made an order upon him to pay the moneys, and gave him a discharge for so doing. The money being accordingly paid over by the plaintiff to the guardians, was mixed with their general funds, and expended in the general maintenance of the poor of the whole parish of Chatham, there being only one workhouse, and one fund for the maintenance of the poor. The whole sum was so expended within a few months after payment of it by the plaintiff, the trustees judging that they could not legally make a rate upon the inhabitants with such a balance in their hands. On the 14th of May, 1823, certain inhabitants of Chatham *intra* petitioned the Chancellor to declare that the two thirty-second parts of the yearly produce of Watts's charity ought to be applied to the benefit of the poor of that district, and to appoint trustees and receivers of the same, and to order the said sums received by the plaintiff as treasurer of the guardians of the poor of the parish of Chatham to be *paid to such trustees; and being upon such petition declared entitled to the exclusive benefit of the said two thirty-second parts, they obtained from the Master of the Rolls (in June 1828) an order upon the plaintiff to pay into court the said two sums of 620*l.* 18*s.* and 494*l.* 14*s.* 4*d.*, which he accordingly did, and the same were afterwards, under the direction of the Court of Chancery, applied for the benefit of the inhabitants of Chatham *intra*. This action was brought to recover the amount.

Campbell, for the defendant, being asked by the Court what were the objections to the action, stated them as follows:—First, as the guardians are not a corporate body, and as the action must be considered to be brought against the persons who were guardians when it was commenced, the present guardians are not liable for the sum now claimed, as money had and received by them. For it does not appear that any person who was guardian when the money was received was also guardian when the action was commenced. Secondly, this was not money paid at the request of the present guardians. Thirdly, neither was

it even the plaintiff's money which he paid over, it was what he had received from the Court of Chancery, and the mayor, &c., of Rochester. Fourthly, it was a payment made by the plaintiff in his own wrong, under a mistake of law. Fifthly, this money has been expended, and cannot be recovered, so that the judgment would be a nullity, for the treasurer is not personally liable, since by s. 39 he is to be reimbursed all damages, and expenses he shall be put to, out of the moneys received by virtue of the act: and it is clear the guardians cannot make a rate for the costs and damages of this action.

*839] **Platt* for the plaintiff. The plaintiff is entitled to maintain this action. In the first place, the guardians of the poor, if not a corporation, are, at least, a continuing body for all the purposes of the local act. It is not even necessary that the individual members should be changed from year to year. They have powers given them by the statute for certain purposes, which cannot be accomplished unless the guardians are to be a continuing body. Those purposes, among others, are the erecting and providing a workhouse, by section 27; making contracts for the altering and repairing of the poor-house, and for other matters, by s. 32; borrowing money on mortgage, by s. 36, and the granting of annuities, by s. 37. Even if, according to *Tawney's case*, 2 Salk. 531, 2 Ld. Raym. 1009, the guardians have not authority to make a rate to reimburse themselves for this money specifically, yet they are not bound to designate the purpose in the rate. But this judgment will be a charge upon the defendant, brought upon him by reason of his being made defendant. He will, therefore, clearly, within section 39, be entitled to be reimbursed by the guardians. Then it is said that the first payment to the guardians was made by the plaintiff in his own wrong. But by the eighteenth section, the treasurer is to pay the moneys received by him, on account of the poor, as the guardians shall order and direct. Accordingly, the plaintiffs having received a sum of money on account of the poor, the guardians order and direct him to pay it over to them. He was bound to obey them, and did so. Afterwards he was compelled to pay back that same *840] sum. As their treasurer, he might have *been sued for this money, and he therefore paid it for them and for their use. If he had continued treasurer, and been sued, and had paid it after the action, he could have been reimbursed; so he may also under the present circumstances.

Campbell, contra. The guardians are not a corporation. It is said, that it may be assumed that there is no change of persons, but the guardians are to be chosen yearly. [TAUNTON, J. They may be re-elected.] Eight must go out of office every year. Then the money had and received by the guardians in 1822 cannot be money had and received by those who are guardians in 1830. There is nothing in the act to constitute them a corporation; they are only substituted for the churchwardens and overseers of the poor who perform the same functions in other parishes. [Lord TENTERDEN, C. J. They may borrow money and grant annuities.] Only for the purposes of the act; and such powers are given to all churchwardens and overseers by the 59 G. 3, c. 12. No doubt a corporation may be created by implication without charter or seal, *Conservators of the River Tone v. Ash*, 10 B. & C. 349, where the purposes of the appointment cannot be carried into effect, unless they are made a corporation. But that is not the case here: and it would be hard if the guardians could hold the present inhabitants liable for charges incurred by former guardians at a distant period. [PATTESON, J. There is a clause which empowers them to take land to them and their successors.] The powers granted to them can only apply to such acts as they are authorized to do under the statute. Then this is not money *841] paid to the *use of the guardians; they did not direct the plaintiff to refund. Neither was it his money which the guardians received from him in the first instance. It was received by him from the Court of Chancery, and he was wrong in paying it over to the guardians. This falls within the principle of the cases of *Bilbie v. Lumley*, 2 East, 469, *Brisbane v. Dacres*, 5 Taunt. 143, and *Skyring v. Greenwood*, 4 B. & C. 281, and being money paid under a mistake of law is not recoverable. Then as to the reimbursement, the

rate cannot be laid for a purpose which may not be expressed. And the guardians could not make a rate expressly to reimburse themselves for money laid out eight years ago. *Rex v. Goodcheap*, 6 T. R. 159.

Platt in reply was stopped by the Court.

LORD TENTERDEN, C. J. No one can doubt that in moral justice the plaintiff ought to recover; and I am glad that there is not any legal objection to prevent him. The first point is, that the guardians of the poor are not a corporation. It is unnecessary to say whether, strictly speaking, and for all purposes, they constitute a corporation, because I am of opinion that they are so in substance and effect for all the purposes of this act. They have perpetual succession; they are to continue for all time; they may take land, and make contracts which shall be binding, not upon themselves personally, but upon the persons filling the office. Indeed if this were not so, no one would accept it. They are, then, in the nature of a corporation for the purposes of the act. Then as to the plaintiff's title to *reimbursement. Mr. Jefferys was the treasurer of the guardians. He preferred an information in the Court of Chancery [*842 for the benefit of that part of the parish which was within the liberties of Rochester, praying that a certain portion of the charity fund should be paid to them: a general order was made by the Court of Chancery to pay the money to the treasurer of the guardians of the poor; but no direction was given how it was to be applied. The guardians ordered him to pay it to them, and he paid it to them. If they did not apply it as they should, I do not see how he could help it. Then a petition was presented to the Lord Chancellor on the part of the specific district of Chatham *intra*; and the Court, thinking the money ought not to have been applied as it had been, ordered the plaintiff to repay it, which he did. Under these circumstances, I think he must be considered as having paid that money for the use of the guardians of the poor, for it was money which they ought to have paid, and consequently that he is entitled to recover it. Then, it was urged that the defendants had no means of reimbursing the plaintiff. But there is a special provision in the act which authorizes the guardians to reimburse the treasurer, out of the moneys to be received by them under the act, all costs, charges, damages, and expenses which he shall be put to by reason of his being made a defendant. Damages and costs will be recovered by this judgment against the defendant who is treasurer, and for these he may, by the terms of the action, be reimbursed. I do not know that the guardians may not make a rate specifically entitled for this purpose. It is said that this will fall hard upon the present inhabitants. That may be so. But the inhabitants of *a parish are for many purposes considered as a continuing body. It is so in cases of actions against the hundred; and where the collectors of land or assessed taxes are found deficient, there must be a re-assessment, and the inhabitants must make good the deficiencies, though they may be different persons. [*843

PARKE, J. It is clear, on the thirty-ninth section, that the action is to be brought against the person who is treasurer at the time when it is so brought. The defendant was so here. Then what is the case? The plaintiff, by compulsion of law, paid money which ought to have been paid by third persons. The money being in his hands as treasurer, an application was made by the solicitors of the district, claiming it; but he was compelled to pay it over to the trustees his masters. Proceedings were afterwards taken against him, and, as between him and his masters, they ought to have repaid it, but they did not. He was compelled to pay it, and he can now recover it from the guardians, who will have no difficulty in reimbursing themselves.

TAUNTON, J. Without considering for what purposes the guardians of the poor under this act constitute a corporation, I am of opinion that, for the purpose of suing and being sued in the name of their treasurer, they are in the nature of a corporation, and that the action is properly brought against the present treasurer. It is said that the payment by the plaintiff to the guardians was in his own wrong. I think the converse of that is undoubtedly true; that

the receipt of the money by them was a receipt in their own wrong. I do not see how the plaintiff could have refused to pay it over, when they *insisted *844] on his doing so. Afterwards there was an order of Court by which he was directed to pay the same money over for the benefit of certain persons appointed as trustees of the poor of Chatham. Under that order, made by a competent jurisdiction, he was bound to pay the money into court. He did so, and paid so much to the trustees out of his own pocket. It is said there never was any money had and received by the guardians to the plaintiff's use; but, if not, still this was money paid to the use of the guardians. The plaintiff having paid over to them as their servant a certain sum of money which he was afterwards compelled to repay into court for them and on their account, it is money paid to their use. Then it is said, the guardians cannot make a rate to meet this demand; but the treasurer for the time being is the defendant on the record. If he is bound to pay, he is entitled to be reimbursed by them.

PATTESON, J. The act of parliament says, that the guardians shall sue and be sued in the name of their treasurer. It does not make the treasurer liable. That being so, I think that this action is maintainable on the count for money paid, for the plaintiff has advanced a sum of money which the guardians ought to have paid. The defendant, as their present treasurer, is liable at the plaintiff's suit, and there will be no difficulty in making a rate to reimburse him.

Judgment for the plaintiff.

*845]

*TAYLOR v. WILLANS. Nov. 11.

(In Error.)

In an action for maliciously indicting A. for perjury, it appeared that the defendant B., in 1824, preferred the indictment, and gave evidence before the grand jury, that the bill was found removed into K. B., and tried in 1827; and that B., who was then in custody, was brought into court under a habeas corpus obtained by his attorney, on the ground that he was a material witness; but he did not give evidence, and A. was acquitted. The Judge in his direction told the jury, that if the defendant did not appear at the trial as a witness from a consciousness that he had no evidence to give which would support the indictment, then there was a want of probable cause, and they should find for the plaintiff; but if his non-appearance did not proceed on that ground, then there was no proof of want of probable cause, and they should find for the defendant. The defendant offered no evidence, and the jury found for the plaintiff:

Held, upon error, and a bill of exceptions, whereby the objection stated to the summing up was, that the Judge himself ought to have determined, upon the facts, whether there was probable cause, without leaving any question to the jury: That under the circumstances, the motive which induced the defendant not to appear as a witness, was a question of fact for the jury, and they might be directed to conclude that there was or was not probable cause, and to find for or against the defendant, according to their opinion of the motive.

A. being taken before a justice of peace to be bailed, the defendant's attorney objected, that the justice had no power to bail him. A letter, proved to have been written by a Judge's clerk, purporting to be by authority of the Judge, but without proof of such authority, was given in evidence for the purpose of showing that the justice was induced, by such letter, to bail A.: Held, that the letter was admissible for that purpose.

An affidavit made by the attorney's clerk was put in, as showing that those who conducted the prosecution had taken means to prevent a person becoming bail for A. This was held to be admissible, without calling the clerk to prove an authority from his master to make the affidavit. The defendant below tendered a bill of exceptions, and afterwards brought error. The bill of exceptions not having been ready when the writ of error was returned, the Court, on consideration of the circumstances, allowed it to be tacked to the record afterwards.

ERROR on a judgment in the Common Pleas. The action was brought for falsely and maliciously, and without probable cause, indicting Willans, the plaintiff below, for perjury alleged to have been committed by him on the trial of an action against Taylor for penalties under the gaming act, 9 Ann. c. 14; and the evidence on which perjury was assigned, was to the effect, that Willans had lost to Taylor, at a gaming-house kept by him, at *rouge et noir*, various sums of money at different times; and that certain entries made by him, Willans, on a paper which he produced, were made by him as the transactions occurred. On

the trial of the indictment, in February 1827, Willans was acquitted. Taylor pleaded to the present declaration, not guilty, *and the cause came on for trial before Best, C. J., who nonsuited the plaintiff. That nonsuit [*846] was set aside by the Court of Common Pleas, and a new trial granted, (a) and the case was again tried before Tindal, C. J., at Westminster, in December 1829, when a verdict was found for the plaintiff. A bill of exceptions was tendered to the Chief Justice on his reception of evidence, and on his charge to the jury. Judgment having been signed, a writ of error was brought thereon, and the record removed into this Court; and the bill of exceptions was attached to it after the removal. (b)

The bill of exceptions stated the following facts: Evidence was produced on the trial of the cause to prove that a bill of indictment for perjury had been preferred against Willans at the Middlesex sessions in February 1824, and ignored: that it had the names of several witnesses on the back, but not that of Taylor: that a similar bill was preferred at the following sessions, and found, and removed into the King's Bench, on the back of which bill were the names of (among others) Taylor and Staniland: that a Judge's warrant was obtained by Staniland, the clerk to Taylor's attorney, for the apprehension of Willans, who was thereupon taken into custody, and was afterwards, on the 16th of September, 1824, brought before *Sir Richard Birnie at Bow Street to be bailed, [*847] Staniland being there at the time, and counsel to oppose the bail: that an objection was made before Sir R. Birnie to the bail being taken by him, because the arrest was in Middlesex; but a letter was produced to Sir R. Birnie as having come from Lord Tenterden, which letter was written by John Waters, clerk to Lord Tenterden, who was then (September 1824) with Lord Tenterden at Bristol. The bill of exceptions then stated, that upon this letter being put in, at the trial of the cause, the defendant's counsel objected that it was not admissible; but the Chief Justice (Tindal) overruled the objection, and it was read, and was as follows:—"To Mr. W. Willans. Sir,—The Lord Chief Justice has directed me to inform you, that he has received your letter, and in answer thereto, desires me to say, that if Sir Richard Birnie thinks fit to take bail, he, the Chief Justice, sees no objection to his doing so in the absence of the Judges from London:" that the plaintiff's counsel afterwards proposed to withdraw the letter; but this was refused, as it had been read to the jury. It was also in evidence on the trial of the cause, that, Taylor being in custody, his solicitor made an affidavit that he, Taylor, was a material and necessary witness in support of the prosecution for perjury, without whose testimony it would not be safe to go to trial, and thereupon a writ of habeas corpus was issued, upon which Taylor was brought up to the Court of King's Bench, in February 1827, to attend the trial of the indictment, and went into Court: but he was not examined as a witness: that one Crawford had been applied to to become bail for Willans, in September, 1824, and that Staniland, who was then clerk to Taylor's attorney, and acting with him in the prosecution for *perjury, came to the said Crawford once or twice: that on the trial of this cause, an affidavit was pro- [*848] duced, made by Staniland, on the 16th of September, 1824, to the reception of which the counsel for the defendant objected; but the Lord Chief Justice admitted it, and it was read: it stated that Staniland had informed Crawford of the offence with which Willans was charged, whereupon Crawford said he would consult his solicitor before he became bail; that Crawford's wife had afterwards told Staniland her husband would not become bail; and that for these reasons he, Staniland, had not made any inquiries touching the sufficiency of Crawford to be bail.

(a) See 6 Bingham. 183.

(b) See 6 Bingham. 512. The bill of exceptions not having been ready when the record was removed, a rule nisi was obtained afterwards for taking the bill of exceptions to the record *nunc pro tunc*. Cross, Serjt., cited Dillon v. Parker, 1 Bingham. 17, to show that it could not be done after the record was removed. Denman, Attorney-General, and White, argued that the present case was distinguishable, because the bill of exceptions had been delayed by the fault of the plaintiff below. The rule was made absolute on condition of the defendant below paying all the costs, and bringing the amount of the judgment into court. Mich. T. 1830.

The bill of exceptions then continued thus: "And the counsel for the said Josiah Taylor then and there declined to produce any evidence on his behalf, and insisted that no sufficient evidence had been given of want of probable cause for the prosecution of the said Wm. Willans for perjury; and that, admitting the facts proved in support of the present action to be true, the want of probable cause was a question for the determination of the said Chief Justice, who ought to determine (the facts being admitted), whether sufficient evidence had or had not been given of want of probable cause; and the said Chief Justice did then and there declare and deliver his opinion; and the said Chief Justice, in summing up the facts proved in the cause to the jury, stated to them that this action was not maintainable merely on the ground that the prosecution for perjury was malicious, but that the prosecutor must be shown to have had no probable or reasonable grounds for instituting the prosecution; that the fact, to which he directed the attention of the jury, was the non-appearance of the prosecutor J.

*849] Taylor as a witness on the second indictment; that *if Taylor did not appear as a witness from a consciousness in his own mind that he had no evidence to give which would support the indictment, then the Chief Justice thought there was such want of probable cause for the prosecution as would make the action maintainable; but if the jury thought that the prosecutor's non-appearance did not proceed upon that ground, then there was no proof of the want of probable cause, and the jury should find for the defendant; and the said Chief Justice did thereupon state to the jury the facts of the case, which might induce them to come to a just conclusion on that point, and also stated the other facts of the case which bore upon the question, whether the prosecution was malicious or not. Whereupon the counsel for the defendant did except to the last-mentioned opinion and direction of the said Chief Justice, and insisted that it ought not to have been left to the jury to infer the want of probable cause for the said prosecution against the said W. Willans from the documents and facts proved and undisputed, or to draw the inference of an admission by the defendant of the want of probable cause from those documents and facts; but that as they were undisputed, the want of such probable cause was a question for the determination of the said Chief Justice, and that such question was evaded by leaving the inference to be drawn by the jury that the defendant admitted the want of such probable cause. And the said jury found that there was not any reasonable or probable cause for the said prosecution, and thereupon gave their verdict for the said W. Willans." Error was assigned on the three points excepted to at the trial, and on others, which it will not be necessary to notice.

*850] **White* for the plaintiff in error. There are three objections raised on this bill of exceptions. The first to the reception of Waters's letter; the second to that of Staniland's affidavit; and the third to the Judge's direction to the jury. On the first point it was not sufficient to prove the handwriting to that letter; it should have been shown to have been written by the authority of Lord Tenterden. That cannot be inferred from the circumstance of Waters being his Lordship's clerk, and being with him at Bristol, because the writing of such a letter was no part of his ordinary and proper duties. Waters should have been called himself to prove that he had had such authority. As it had been produced, and had its effect with the jury, the offer to withdraw it was of no avail. Then, as to Staniland's affidavit, there was no proof of any fact stated in it; and, upon this evidence, it was not admissible against Taylor. There is no proof of an authority from Taylor or his attorney to make such an affidavit. Staniland was employed by the attorney, but his employment can only be taken to have extended to such proceedings as were necessary and proper. Whether this affidavit was proper or authorized by Taylor or his attorney could only be proved by Staniland, and he ought to have been called. Then, as to the misdirection. The learned Judge ought not to have left the question of want of probable cause to the jury, but should have decided it himself in favour of the defendant. In *Johnstone v. Sutton*, 1 T. R. 545, it is stated that "the question

sel for the defendant declined to produce evidence on his behalf, and insisted that no sufficient evidence of the want of probable cause had been given; and that, admitting the facts proved to be true, the want of probable cause was a question for the determination of the Judge, and that the said Chief Justice ought to determine whether sufficient evidence had or had not been given of the want of probable cause." After the charge is given, the objection is put in this form: "Whereupon the counsel for the defendant did except to the said direction of the said Chief Justice, and insisted that it ought not to have been left to the jury to infer the want of probable cause from the documents and facts proved and undisputed, or to draw the inference of an admission by the defendant of the want of probable cause from those documents and facts; but as they were undisputed, the want of such probable cause was a question for the determination of the said Chief Justice, and that such question was *evaded* by leaving the inference to be drawn by the jury that the defendant admitted the want of such probable cause." It was left for the jury to determine whether Taylor's non-appearance arose from a consciousness that he had no evidence to give which would support the indictment, or from any *other cause. Now, the exception ultimately taken is not that the evidence was not sufficient for the jury to draw any con- [*857] clusion, but that the Judge ought to have drawn it himself. It has been carried further in the argument to-day, for it has been urged that the non-appearance of the prosecutor does not necessarily induce the conclusion of a consciousness at that time, that when the prosecution was originally instituted, he could have given no evidence to support it. That may be so. But the conduct of a party in a late period of a cause is a material circumstance, from which his motives at an earlier period may be inferred. Why might not the forbearance of Taylor to appear to give evidence at the trial, under the very peculiar circumstances of this case, raise an inference that his motive was a consciousness, that he had no probable cause for instituting the prosecution? The motives of parties can only be ascertained by inference drawn from facts. The want of probable cause is, in some degree, a negative, and the plaintiff can only be called upon to give some, as Mr. J. Le Blanc, a most accurate Judge, says, slight evidence of such want. As, then, slight evidence will do, why might not the circumstances of this case be left to the jury as grounds for a conclusion of fact? What conclusion they would draw is another thing. The question of probable cause is, indeed, a mixed question of fact and of law; and the rule, as expressed in *Johnstone v. Sutton*, 1 T. R. 545, is correct. The Judge is to give his opinion on the law, and to leave the jury to determine the facts, which include the motives of the parties: and where he tells them that if they think the prosecutor had a certain motive for his conduct, then there was probable cause; but if he had not that motive, *then there was no probable cause; I think such a summing up [*858] does properly separate the law from the fact, and is conformable to the rule.

PARKE, J. With respect to the letter of Lord Tenterden's clerk, it was produced to show why Willans was bailed, and that it was not through any indulgence on the part of Taylor: it was therefore admissible as a part of the *res gestæ*. A similar answer may be given to the second objection. Staniland's affidavit was not admissible to prove the facts therein stated, but it shows a step taken by those who acted in the prosecution. Then, as to the misdirection. The complaint before this Court is, that the Chief Justice ought to have drawn the inference from the facts, and not have left it to the jury; but the rule in *Johnstone v. Sutton* is correct, that the jury are to find whether the facts be true; and it is for them also to draw the inference which the facts raise. Here the facts are, that an indictment was preferred on which Taylor was not a witness, and it was ignored; another was preferred when he was a witness, and it was found. At the trial, however, he did not appear, though in court under a *habeas corpus*. What inference was to be drawn from that, was a question, not for the Judge, but for the jury; it was therefore correct for the Chief Justice to leave it to the jury to find whether he had any other reason or cause for not appearing than the consciousness that he had no evidence to give, and that his former

information to the grand jury had been false. For these reasons, looking at the form in which the objection is taken, I think it cannot prevail.

*859] *TAUNTON, J. I am of the same opinion. The letter was admitted, not to prove the facts contained in it, but to show why Sir R. Birnie consented to take bail. The affidavit, also, was properly proved as a step in the cause. If it had been stated in opening the case, or in evidence, that such an affidavit had been made, and it had not been produced, the non-production of it might properly have been objected to. The third exception is the most important. I have always understood the rule laid down in *Johnstone v. Sutton* to be the correct one. The evidence given in this, as in all other actions, is exclusively for the jury. They are to say whether they will give credit to a particular witness; and where the facts proved lead to a conclusion of some other fact, they are to draw that conclusion; and if they believe the witnesses, and draw certain conclusions of fact from the testimony, it is for the Judge to say whether the facts, so found, show a want of probable cause or not. That becomes, then, a mere conclusion of law resulting from a consideration of all the evidence. Now the plaintiff in error in this case might have specified in his bill of exceptions that the facts proved at the trial, and found by the jury, did not show a want of probable cause; but no such exception is taken, or error assigned. The objection is not that the Judge drew a wrong conclusion from the facts found, but it is to the form of his direction to the jury. He said to the jury, "If you think that Taylor did not appear as a witness at the trial, from a consciousness that he had no evidence to give which could support the indictment, then I am
*860] of opinion that there was want of probable cause *for instituting the prosecution." Now it is true, that the expression there used by the learned Judge imported a consciousness at the time of the trial; and a doubt has been raised, whether that necessarily led to an inference of want of cause at the time of instituting the prosecution. But still, there was nothing incorrect in his leaving the question to the jury, and stating to them that if they, the jury, thought Taylor's non-appearance at the trial showed a consciousness at that time, that he could give no evidence which would support the prosecution, then he, the Judge, was of opinion that there was a want of probable cause at the time of instituting the proceedings. There are many cases, as in felony, where the motives of parties are necessarily submitted to a jury. Here the motive that induced Taylor to forbear giving evidence was a question of fact submitted to the jury; and if that was properly left to them, then I think the Chief Justice had a right to draw his own inference in law as to the want of probable cause, from the fact as they found it.

PATTESON, J. As to the letter, it is immaterial whether it came by my lord's authority or not. Sir R. Birnie equally acted upon it. Staniland's affidavit was also admissible, for the reason already given. Then, as to the misdirection; the objection taken at the trial was, not that the Chief Justice left the question to the jury in an improper manner, but that it ought not to have been left to them at all. For it is stated in the bill of exceptions, that the question was *evaded* by being left to the jury. But if the consciousness of Taylor as to what he was doing was to be entered into at all, it surely was a conclusion of fact to
*861] be deduced from all the *circumstances of the case. Then there was something that ought to have been left to them. It is said, however, that the consciousness of Taylor at the time of the trial of his not being able to give evidence *then*, cannot be a proof of the want of probable cause at the original institution of the proceedings. But if any doubt could be raised on this point, it is sufficient to say that the exception should have been taken at the trial, and pointed out then, when the Judge might have had an opportunity of correcting his expressions, if ambiguous or otherwise wrong. The objection actually taken is, that nothing ought to have been left to the jury: but I think there was a question for their consideration. Judgment affirmed.

The KING v. The Inhabitants of MUCH COWARNE. Nov. 12.

An idiot, though separated from his parent after the age of twenty-one, cannot be emancipated.

UPON an appeal against an order of two justices, whereby John Yarnold was removed from the parish of Great Witley, in the county of Worcester, to the parish of Much Cowarne, in the county of Hereford, the sessions confirmed the order, subject to the opinion of this Court on the following case:—

The father and mother of the pauper were married in the year 1792, and the pauper was born in 1793, and is and always has been an idiot. The pauper and his father and mother resided together in the parish of Great Witley, the then legal settlement of the father, till 1822, when the mother died. In 1824 the father *left the pauper (being then about thirty-one years old) in the parish of Great Witley, and hired himself out as a servant in husbandry [*862 to different masters during that year, and also during the year 1825, and until he married a second wife in 1826: he then went to Much Cowarne, the appellant parish, and resided there upon some property belonging to his second wife until her death in 1830, and there gained a settlement. After the father left Great Witley he never returned to it; but the officers of that parish took care of the pauper, and never applied to the father for any assistance or remuneration for what they paid. The court of quarter sessions found that the pauper was incapable of taking care of himself, through imbecility of mind, at the time of the separation from his father, seven years since, and that previously to that time he was not emancipated from the same cause. The question for the consideration of this Court was, whether, under the above circumstances, the pauper's settlement was in the parish of Much Cowarne or not.

Shutt and *W. J. Alexander* in support of the order of sessions. The pauper being an idiot, the question is, whether he could be emancipated after he had reached the age of twenty-one. The doctrine of emancipation at that age proceeds upon the presumption that the child ceases then to require the protection of his parents, and can provide for himself. But an idiot cannot provide for himself, since he can make no contracts that will bind him, *Beverley's case*, 4 Co. 124 b. Besides, the sessions have expressly found that he was incapable of taking *care of himself through imbecility of mind. It is obvious, [*863 therefore, that such a person must require the protection of another. In *Rex v. Offchurch*, 3 T. R. 114, Lord Kenyon says, "Ordinarily speaking, one of these things must happen before the son can be said to be emancipated. Either he must have obtained a settlement for himself, or have become the head of a family, or at most he must have arrived at that age when he may set up in the world for himself." The pauper has satisfied none of these tests, for it cannot be said that he has arrived at an age when he can set up for himself in the world. Then the separation of the idiot from his parent makes no difference in this case, *Rex v. Broadhembury*, 2 Bott, pl. 66, 6th ed., Cald. 498. "The reason of drawing a distinction between separation before and after the child had attained the age of maturity ceases when imbecility of mind or body induce the necessity of its continuing in a sort of perpetual pupillage." 1 Nolan's Poor Laws, 320. The relief to the pauper in the parish of Witley was no evidence of his settlement, *Rex v. Coleorton*, 1 B. & Ad. 25.

Godson, contra. The question is not, whether the pauper was able to provide for himself or not at twenty-one? but, whether, after he has attained that age, the policy of the poor laws will suffer him to be removed, as part of his father's family, whenever his parent may gain a fresh settlement? That cannot be allowed. In *Rex v. Broadhembury*, 2 Bott, pl. 66, 6th ed., Cald. 498, the pauper was not twenty-one at the time of the separation; and that distinction prevails in all the cases. *Rex v. Wilmington*, 5 B. & A. 525, *Rex v. *Hardwick*, 5 B. & A. 176. In the last-named case, it is laid down by [*864 Lord Tenterden that the parent's new settlement will not be communicated to the child, unless in fact he continues part of the family. Here the pauper was

not living with his parent, and did not form a part of the family when he attained twenty-one. The distinction between a voluntary and a compulsory separation is immaterial, as Mr. Justice Holroyd observed in the same case. The circumstance of the pauper being an idiot does not vary this proposition; for he cannot, at his present age, be removed from parish to parish as his parent's settlement may change; *St. Michael's in Norwich v. St. Matthew's in Ipswich*, 2 Bott, pl. 58; and he is not removed to form a part of his parent's family, but to relieve the parish of a charge. It is not necessary that the son should have gained a settlement for himself; *Rex v. Stanwix*, 5 T. R. 670.

LORD TENTERDEN, C. J. The order of sessions must be confirmed. A child unemancipated follows the settlement of his father; and the general rule is, that until he reaches twenty-one, the child is not emancipated, unless he becomes the head of another family, or does some act to gain a settlement; but if, after twenty-one, he separates himself from his father's family, he is emancipated. Why is twenty-one the period thus fixed by the law? Because at that age the party is presumed in law to be competent to take the management of his own affairs. Here the pauper never was and never will be competent to do so. The reason, therefore, *for which that period is fixed upon in other cases, wholly fails
*865] in this.

PARKE, J. If the pauper were a minor, he would have continued unemancipated. Now it is found he was incapable of maintaining and taking care of himself, through imbecility of mind; he must therefore be considered as in the same situation as if he had remained a minor.

TAUNTON, J. The rule has been correctly stated to be, that where a party, after twenty-one, separates from his father's family, and can provide for himself, and requires no farther protection, he is emancipated. That rule does not apply here.

PATTESON, J. The words, in *Rex v. Hardwick*, that "where the new settlement is acquired by the parent after the child has attained twenty-one, it will not be communicated, unless, in fact, the child continues part of the family," must apply only to a member of the family capable of supporting himself.

Order of sessions confirmed.

*866]

*The KING *v.* The Inhabitants of IDE. Nov. 12.

An assignment of a parish apprentice is not subject to the regulations imposed by the statute 8 Anne, c. 9, and need not, therefore, be stamped within two months, nor must the consideration paid for such assignment be set forth in it.

UPON an appeal against an order of two justices, whereby John Stroude was removed from the parish of Hennock, in the county of Devon, to the parish of Ide in the same county, the sessions confirmed the order, subject to the opinion of this Court on the following case:—

By indenture, bearing date the 25th of April, 1817, made in pursuance of a previous order of two justices, and in conformity to the provisions of the stat. 56 G. 3, c. 139, the pauper John Stroude was bound apprentice by the overseers of Ide, to Ambrose Badcock of the same parish. By an assignment, dated the 2d of May, 1817, made pursuant to the provisions of the 32 G. 3, c. 57, and in the form prescribed by the schedule to that act, and with the consent of two justices as directed by the statute, the apprentice was assigned by Ambrose Badcock to James Long of the parish of Hennock, and lived with Long in that parish, in service under the assignment, a sufficient length of time to gain a settlement. The assignment was executed by Badcock and Long, and the two justices; and at the time of the production of it in Court on the hearing of the appeal, it bore a one pound stamp which had been affixed on payment of the

penalty a short time before, and more than six months after the date and making of it. Badcock paid Long 5*l.* as the consideration of this transfer of the apprentice to him; but this was not set out in the assignment, nor was any mention made of it therein. And on this *account it was contended by the respondent parish (Hennock), that no settlement could be gained under it; and the question for the opinion of this Court was, whether the pauper had gained a settlement by his residence and service under this assignment. [*867]

Escott in support of the order of sessions. The assignment was not receivable in evidence, not having been stamped in time, and the premium paid on the assignment not having been set out therein at length. This objection arises on the 8 Anne, c. 9, s. 35, 36, 37, 38, and 39, which require that the full sum received, paid, or contracted for in relation to any apprentice shall be truly inserted and written at length in some indenture *or other writing* which shall contain the covenants, articles, contracts, or agreements relating to the service of such apprentice, and shall be duly stamped within two months of the execution, and shall have the sum contracted for, &c., truly inserted therein; in default of which, or of regular stamping, such indenture, &c., shall be void. It is not sufficient that this assignment was stamped with the stamp imposed by 55 G. 3, c. 184, if it ought to have been stamped within two months after the date, the time specified in the statute of Anne; *Rex v. Chipping Norton*, 5 B. & A. 412. It must be considered within that act, since, though not an indenture, it still falls under the meaning of the words "other writing." And in the latter stamp acts, 44 G. 3, c. 98, 48 G. 3, c. 149, and 55 G. 3, c. 184, a duty is expressly imposed upon the assignments of indentures, whence it may be fairly inferred that in the statute of Anne the *legislature intended that such an instrument as the present should be placed under the regulations there established. But if that be not so, yet it is enacted by the later statutes that all the regulations contained in the previous acts shall be revived and applied to the cases which are contained therein. Therefore it was necessary to insert the consideration in this assignment, and to have it stamped within two months. In *Rex v. Oadby*, 1 B. & A. 477, where it was held that the consideration need not be inserted in a parish indenture, the money advanced was parish money, but that was not the case here. [*868]

Praed, contrà. This is the case of a parish apprentice, and not that of a private indenture. Under the statute of Anne parish indentures need not be stamped, nor the assignment either, if it be contained therein. If such assignment would not have been liable to duty under the statute of Anne, the provisions of that statute cannot be made applicable to it by any later act. But until the 32 G. 3, c. 57, there could not be, in strictness of law, any assignment of a parish apprentice, *Rex v. East Bridgeford*, Burr. S. C. 133; *Rex v. St. Petrox*, Ibid. 248; *Rex v. Barleston*, 5 B. & A. 780. The statute of Anne, therefore, could not apply to that which was only legalized by a subsequent enactment. As to the words "other writing," in the sections quoted, they cannot apply to an instrument like the present, but must refer to a deed poll or something equivalent to an indenture. No duty being payable on a parish indenture, there is no need of the *insertion of the premium therein, *Rex v. Oadby*, nor, consequently, in the assignment. Besides, the statute 32 G. 3, c. 57, gives two forms of the assignment of a parish apprentice in schedules D. and E.; but there is no mention of the premium in either. [*869]

Lord TENTERDEN, C. J. I am of opinion that this instrument was sufficiently stamped, and in due time. It is said that the assignment is within the meaning and provisions of the statute of Anne, whereby it is required that the premium paid on the indenture of apprenticeship shall be truly set forth in the instrument; and here the sum paid by the new master to the old is not set out. Therefore the question arises whether an assignment of an indenture of an apprentice is within that statute. Now, it has been often held that acts which impose a charge on the subject, must be construed strictly. The stamp acts, therefore, cannot apply to instruments not specifically designated therein, and

hence the modern stamp acts are framed so elaborately to comprehend all possible cases. Unless, therefore, the assignment of an apprentice be distinctly intended in the statute of Anne, we cannot hold it to be subject to the duties there imposed. But every word there manifestly applies itself to the original instrument only, and not to a subsequent assignment. Under the late stamp acts, the indenture of apprenticeship, and an assignment thereof, are treated separately, and are made subject to separate duties, which clearly shows that the legislature thought the latter would not be included under the terms used in the statute of Anne. The order of sessions must, therefore, be quashed.

*870] *PARKE, J. Considering the strict construction that ought to be put on a statute which imposes duties upon the subject, I think an assignment of this kind cannot be looked upon as included in the statute of Anne.

TAUNTON and PATTESON, Js., concurred. Order of sessions quashed.

The KING v. The Inhabitants of MACCLESFIELD. Nov. 12.

The pauper took a house, consisting of a house-place, a chamber over it, and above that a garret, which extended over the lower rooms in the adjoining house. He afterwards took the adjoining house, in addition to the rest of the premises, from the same landlord, for a year, at 10*l.* rent. The whole was under the same roof, though there was no internal communication. He dwelt in that part which he first hired, and put a journeyman to work in the other: Held, that he gained a settlement under the 6 G. 4, c. 57, by renting a tenement consisting of a distinct building.

UPON an appeal against an order of two justices, whereby W. Hooley and his wife and son were removed from the township of Adlington in the county of Chester, to the township of Macclesfield in the same county, the sessions confirmed the order, subject to the opinion of this Court on the following case:—

The pauper, who was a silk-weaver, and used to employ journeymen, and had looms of his own, about September 1826 took a house in Compton Row, Macclesfield, at 2*s.* 6*d.* per week. The house consisted of a house-place, a chamber over the house-place, and over that there was a garret which extended over the lower rooms in the adjoining house. About six months after the first taking the pauper took the adjoining house under his garret, and under the same roof, from the same landlady, and paid 4*s.* per week for the whole together. In a week or two the pauper called on his landlady, and agreed with her for the whole premises at the same *rate for a year. He occupied the premises *871] for nearly two years, paying the rent sometimes once a fortnight, and sometimes once a month, as he found it convenient, and the whole rent was paid. He furnished the new part, and put into it a journeyman who worked for him, and who paid the pauper 1*s.* 6*d.* per week for it. At one time the pauper's step-son, a married man with a family, slept in the new part, the pauper having put a bed in it. The step-son paid the same rent which the pauper did. This was before the pauper let it to the journeyman. There was a passage under the chamber floor, and betwixt the two houses, which led from the public street to other houses; and there was no internal communication betwixt the two houses.

Lloyd in support of the order of sessions. The question in this case turns upon the construction of the 6 G. 4, c. 57, which requires that the tenement, the renting of which shall confer a settlement, shall consist of a separate and distinct dwelling-house or building, or of land, or both, *bonâ fide* rented by such person, in the parish; and that such house, building, or land shall be occupied under such yearly hiring. It may, perhaps, be conceded, as there was no internal communication, that the premises here did not constitute one distinct dwelling-house, but they formed, altogether, one distinct building. It is like the case of premises which consist partly of a house and partly of a warehouse;

the whole constitute one building. The object of the act was the prevention of several holdings of portions of houses, in different parts of a parish, being added together to make up the tenement. This case, therefore, is clearly not within the mischief intended to be *remedied: for here, the holding was entire, under one person, and at one rent; and, as to the building itself, it was [*872 all under one roof. The question of occupation does not arise, for it is immaterial who occupies. *Rex v. Great Bentley*, 10 B. & C. 520.

Cottingham, contra. Here has been a separate occupation of distinct premises. The pauper only occupied one part, and allowed his son-in-law, and afterwards his journeyman, to occupy the other, not as a lodger, but as a sub-tenant. Therefore, each part was a distinct dwelling-house; and upon the facts stated, the whole could not be one distinct building, but at the most consisted of a building attached to a dwelling-house. One part was taken first by the pauper, and then another part, and it is found that there was no internal communication between them.

LORD TENTERDEN, C. J. I should have been better satisfied if the justices in sessions had themselves found that these premises formed one distinct building. But it seems to me that they have found so in effect; for it is stated, that the whole was under the same roof: that being so, it is a distinct building, which satisfies the words of the act.

PARKE, J. We must take it, from the facts stated in the case, that this was one distinct building. I am by no means satisfied, that the occupation of a dwelling-house, and another distinct building in the same parish, may not be sufficient to confer a settlement. The object *of the act was to exclude [*873 all questions about the occupation of rooms. It appears to me not to be less a tenement within the meaning of the act, where one detached house is occupied with another. It is not, however, necessary to decide that point here. That there was a sufficient occupation, by the under-tenant, is settled by *Rex v. Great Bentley*; though that will not be sufficient since the new statute 1 W. 4, c. 18, which requires an occupation by the person hiring the premises.

TAUNTON, J. To prevent any misconstruction, it must be understood that the Court decides on the statement of the facts in this case. It is stated that one garret went over both houses, and they were under one roof. It may be too much to say, that two dwelling-houses can constitute one distinct dwelling-house, but this is a separate and distinct building. Then there has been an occupation within the words of the act, which does not say by whom the tenement is to be occupied.

PATTESON, J. It is not necessary now to decide, whether the occupation of two distinct dwelling-houses or buildings in different parts of a parish will be sufficient or not. This was one distinct building under one roof.

Order of sessions quashed.

*The KING v. The Inhabitants of CASSINGTON. Nov. 12. [*874

A. devised to his son, who had come into a parish with a certificate, an estate in these words:—
“My desire is, that my son Robert shall live in that part of my house as he now doth, and at the same yearly rent which he now gives, as long as my son John” (to whom the testator devised the house in fee) “shall enjoy and own the same:” Held, that this was a devise of an estate pur autre vie, which discharged the certificate.

Quære, Whether an estate conveyed to a certificated man on mere voluntary consideration, will discharge the certificate?

UPON appeal against an order of two justices, whereby William Whitley, his wife and children, were removed from the parish of Handborough, in the county of Oxford, to the parish of Cassington, in the same county; the sessions confirmed the order, subject to the opinion of this Court on the following case:—

Robert Whitley, the pauper's father, about sixty years ago, went to the parish

of Handborough with a certificate, duly signed, certified, and allowed, acknowledging that he, his wife, and family were legally settled at Cassington. In 1771 Thomas Whitley, father of the said Robert, duly made his last will in writing, and thereby devised as follows:—"I give and bequeath to my son Robert Whitley the sum of 5*l.*, and my desire is, that my son Robert shall live in that part of my house, as he now doth, and at the same yearly rent which he now gives, as long as my son John shall enjoy or own the same. And all other my estate and stock whatsoever I stand possessed of at the time of my decease I give to my beloved son John Whitley and his heirs for ever." It appeared by the Court Rolls of the manor of Handborough, that, on the 18th of October, 1772, John Whitley, as son and devisee of Thomas Whitley, was duly admitted tenant to the house mentioned in his father's will. It further appeared, from the same Court Rolls, that on the 25th of October, 1773, the said John Whitley surrendered the house to the use and behoof of *Robert Whitley of Handbo-
 *875] rough and his heirs for ever: and at the same court Robert Whitley did his fealty, and was admitted tenant. It appeared also that in the year 1773, it was not usual to state on the Court Rolls the considerations, whether valuable or otherwise, which were given for property surrendered; but they were mentioned in the copies of the court rolls delivered out. The copy was not produced in evidence in this case. Robert Whitley, the pauper's father, resided in the house more than forty days previous to such surrender (*and after his father's death, (a)*) and more than forty days after the surrender, and during this occupation the pauper was born.

Talfourd in support of the order of sessions. The question is, whether the parish certificate has been discharged by the acquisition of an estate. It cannot be said that the pauper's father took anything under the will, for no estate is given to him thereby. Then, has the pauper acquired an estate under the surrender which will destroy the effect of the certificate? It is established by *Rex v. Great Driffield*, 8 B. & C. 684, that a certificate will not be discharged by the acquisition of an estate through the act of the party himself, as by purchase. But it is left undecided there what would be the effect of a voluntary grant by another. Here, too, it is unnecessary to decide that question, for supposing it to be a conveyance from one brother to another, without any consideration
 *876] *appearing, still, as against the parish seeking to discharge itself from the certificate, it must be taken *primâ facie* to have been in the whole or in part for a pecuniary consideration. It lies upon that parish to prove it to be a voluntary grant, *Rex v. Warblington*, 1 T. R. 241. The sessions have not expressly found whether the consideration was voluntary or pecuniary; but as they have confirmed the order, they must be taken to have decided that it was not voluntary.

Chilton, contrâ. Since the decision in *Rex v. Great Driffield*, it cannot be contended that a purchase will discharge the certificate; but the sessions did not intend to find that there was a purchase. At all events, the pauper's father took an estate under the will, and resided forty days after it came to him, which has discharged the certificate. Under the words of the will, "and my desire is, that my son Robert shall live in that part of my house as he now doth, and at the same yearly rent which he now gives, as long as my son John shall enjoy or own the same," Robert took an estate for the life of John, defeasible by his ceasing to own and enjoy the property, and was therefore irremovable. Then, on the other point, the general doctrine is, that the certificate is not discharged by any act of the party himself: but voluntary conveyances fall under a different rule: thus in *Rex v. Upton*, 3 T. R. 251, in which there was a mixed consideration, partly money and partly love and affection, the certificate was holden to be discharged. The present point, therefore, is not decided by *Rex v. Great Driffield*.

(a) The case was amended at the suggestion of the Court, during the argument, by the insertion of this fact, which was agreed to by the counsel on each side.

*Lord TENTERDEN, C. J. It seems to me that, under the will, the pauper's father took an estate per autre vie, that is, for John's life, de- [*877 feasible on his ceasing to enjoy and own the estate. No one could say that John would so cease during the whole of his life; so long, therefore, as John lived, Robert might hold his estate. And it was conveyed to him by the will of his father, and not by his purchase, or any act of his own.

PARKE, J. Robert took an estate for life, determinable on certain events. It is immaterial whether the estate be equitable or legal, the certificate is equally discharged. The case of *Rex v. Great Driffeld*, 8 B. & C. 684, leaves all the cases untouched where the consideration is any other than pecuniary.

TAUNTON, J., and PATTESON, J., concurred.

The rule for quashing the order of sessions was made absolute.

*WILLIAMS v. POCKLINGTON. Nov. 14.

[*878]

A tenant of premises, having built a party wall thereon, let a portion of them, upon a building agreement, for 50*l.* a year. The sub-tenant built a house on his part of the ground, and in so doing made use of the party wall. The agreement contained no stipulation in case of this being done. The sub-tenant underlet the house, when finished, at a rent exceeding 50*l.*:

Held, that the original tenant was not entitled to compensation from his lessee under the building act, 14 G. 3, c. 78, s. 41, for the use of the party wall, since he himself, and not his sub-tenant, was the owner of the improved rent, within that clause.

Semhle, that the clause does not apply where the land adjacent to the party wall is held under an agreement with the builder of it.

ASSUMPSIT for a portion of the expense of a party wall built by the plaintiff pursuant to the act 14 G. 3, c. 78, and cut into and used by the defendant, he then being the owner and occupier, and entitled to the improved rent, of the adjoining premises. Plea, non assumpsit. At the trial before Lord Tenterden, C. J., at the London sittings after Hilary term 1831, it appeared that the plaintiff, being tenant, at a rent of 80*l.* a year, of certain land, upon which he had built the party wall in question, demised several portions of it at rents amounting altogether to 140*l.* a year. One parcel of the land he let to the defendant for fifty-nine years, at a yearly rent of 50*l.*, upon an agreement, by which the defendant undertook to erect a substantial brick dwelling-house upon the premises within twelve months, and to pay all taxes, &c.; and the plaintiff, on his part, agreed, so soon as the house should be completed, to grant the defendant a lease, subject to the usual covenants, at the rent, and for the term aforesaid. The defendant built his house, and in so doing, made use of the party wall; and a lease was afterwards granted him pursuant to the agreement. He then underlet the premises at an advanced rent. The plaintiff thereupon made the claim stated in the declaration: and at the trial, this demand was grounded both on an express promise (after the use made of the wall), and upon the defendant's general liability under the building act, *14 G. 3, c. 78, s. 41.(a) For [*879 the defendant it was urged, that he was not an "owner entitled to the improved rent" within the meaning of the statute. The Lord Chief Justice directed a verdict for the plaintiff, giving leave to move that a nonsuit might be entered. A rule nisi having been obtained for that purpose,

Gurney and *Kelly* now showed cause. The defendant, though holding his premises by lease from the plaintiff, was in the same situation as a stranger with respect to the party wall. There was no covenant entitling him to the benefit of that wall; he might avail himself of it or not, as he thought proper; but

(a) Which provides, "That the person or persons at whose expense any party wall or party arch shall be built agreeably to the directions of this act, shall be reimbursed by the owner or owners who shall be entitled to the improved rent of the adjoining building or ground, and who shall at any time make use of such party wall or party arch, a part of the expense of building the same, in the proportion after mentioned," &c.

if he did so, he was bound to bear a part of the expense. There is no case in which this question has arisen between landlord and tenant; but on principle, a tenant ought to be held liable as much as a stranger. *Lambe v. Hemans*, 2 B. & A. 467, will be relied upon on the other side. There, a person holding a lease of premises at a fixed rent, had assigned them, for a sum of money, to the defendant, who had greatly increased their annual value; but it was held that he was not the owner of the improved rent within the statute. In that case, however, the defendant had not underlet; and there is a material difference between a person taking a house from the lessee, who himself holds at an improved rent, and merely increasing its value, and one who erects houses on ground demised *880] to him on a building lease: the latter is the very description of *person contemplated by the act as likely to make use of the party wall; he takes the property for the express purpose of letting it, when improved, at a higher rent than he pays; and the party who so lets is, according to several cases, the owner pointed out by the statute.^(a) It may be said, that in this case, the defendant was not owner of any improved rent when the party wall was built, or when it was cut into; but in *Peck v. Wood*, 5 T. R. 130, under similar circumstances, that objection did not prevail. Besides, here was an express promise to pay for the use of the wall, and that is a sufficient ground of action, independently of the statute. *Stuart v. Smith*, 7 Taunt. 158.

Campbell, contra. In the case last cited there was an express contract between the parties before the work was done; the work was performed in consideration of it. But here the wall had been built and made use of by the defendant, before the plaintiff advanced his claim. The alleged promise, unless it can be grounded on the statute, is nudum pactum. In the cases hitherto decided, the lands separated by the party wall were in the hands of different persons when the wall was built. Here the same person was, at that time, owner of the lands on both sides; and, where that is the case, such person may make his bargain for compensation in respect of the party wall, when he lets one of the adjacent pieces of ground for the purpose of building. It must be supposed here, that the use of the wall was taken into consideration in the agreement between the *881] *plaintiff and defendant. Besides, according to the decided cases, the plaintiff and not the defendant ought here to be considered the owner of the improved rent. At all events the defendant was not the owner of any improved rent when he first built against the party wall; and if any claim accrued to the plaintiff under the statute, it must have accrued absolutely at that time; it could not have depended on the contingency of the defendant's making a good or a bad bargain with his sub-tenants.

Lord TENTERDEN, C. J. It is unfortunate that the plaintiff, in his agreement with the defendant, did not expressly provide for compensation to be made to him in respect of the party wall which he had then built upon the land. In the absence of any such stipulation, it becomes necessary to see whether the law has made any provision which can supply its place; and I am of opinion that it has not. Suppose the party wall had not belonged to the plaintiff but to a third person, and the plaintiff had been, as he is in this case, proprietor of the land adjacent to the party wall, on which the defendant had built, and which he had let to the defendant at a higher rent than would be given for land unbuilt upon. In that case the plaintiff, and not the defendant, would have been the owner of the improved rent; and it makes no difference, in my opinion, that, in this instance, the plaintiff himself, who is the landlord, is also the builder of the party wall; on the contrary, I think that circumstance rather makes against his claim. At all events, he is the person who, by his contract with the defendant, obtains 50%. *882] a year, which, without such contract, the land would not be worth; he has, *therefore, no claim against any one for compensation under the statute.

PARKE, J. I am of the same opinion. It seems to me that the statute was

^(a) See *Southall v. Leadbetter*, 3 T. R. 458, *Peck v. Wood*, 5 T. R. 130, *Sangster v. Birkhead*, 1 B. & P. 303, *Beardmore v. Fox*, 8 T. R. 214.

not meant to apply where the adjoining land is taken under an agreement with the builder of the party wall.

TAUNTON and PATTESON, Js., concurred.

Rule absolute.

WITHERS v. REYNOLDS. Nov. 14.

R. agreed to supply W. with straw, to be delivered at W.'s premises, at the rate of three loads in a fortnight, during a specified time; and W. agreed "to pay R. 33s. per load for each load of straw so delivered on his premises" during the above period. After the straw had been supplied for some time W. refused to pay for the last load delivered, and insisted on always keeping one payment in arrear:

Held, that according to the true effect of the agreement, each load was to be paid for on delivery, and that on W.'s refusal so to pay for them, R. was not bound to send any more.

ASSUMPSIT for not delivering straw to the plaintiff pursuant to agreement. At the trial before Lord Tenterden, C. J., at the sittings in Middlesex after last Hilary term, the agreement proved was as follows:—

"John Reynolds undertakes and agrees to supply Joseph Withers with wheat straw of good quality sufficient for his use as a stable-keeper, and delivered on his premises as above" (i. e. at Long Acre, London), "till the 24th of June, 1830, at the sum of thirty-three shillings per load of thirty-six trusses, to be delivered at the rate of three loads in a fortnight, in a dry state and without damage. And the said J. W. hereby agrees to pay to the said J. R. or his order the sum of thirty-three shillings per load for each load of straw so delivered on his premises from this day till the 24th of June, 1830, according to the terms of this agreement. (Signed) "JOSEPH WITHERS, JOHN REYNOLDS."

*The straw was regularly sent in from the 20th of October, 1829, when this agreement was made, till the end of January 1830. At that time, the plaintiff being in arrear for several loads of straw, the defendant called upon him for the amount, and he thereupon tendered to the defendant 11l. 11s., being the price of all the straw delivered except the last load, saying that he should always keep one load in hand. The defendant objected to this; but was at length obliged to take the sum offered: and he then told the plaintiff that he would send no more straw unless it was paid for on delivery: and accordingly no more was sent. On the part of the defendant it was submitted that there must be a nonsuit, inasmuch as the plaintiff, on his own showing, had not performed his own part of the contract, which was, in effect, to pay for each load on delivery. Lord Tenterden, C. J., was of this opinion; but directed a verdict for the plaintiff, reserving the point. A rule nisi was afterwards obtained for entering a nonsuit.

Campbell and R. V. Richards now showed cause. Two things independent of each other were stipulated by this contract to be done by the respective parties: the defendant was to deliver straw; the plaintiff to pay the price. No time of payment was specified. There appears nothing which could entitle the defendant to insist on receiving his money till the whole quantity of straw was delivered. Payment, then, was not a condition of the defendant's performance of his contract. His promise was given in consideration that the plaintiff promised to pay, not in consideration of performance. If the plaintiff was bound to pay for each load on delivery, still it does not follow that a refusal to pay for one load excused the defendant from any future performance of his contract. *Weaver v. Sessions*, 6 Taunt. 154. And, according to that case, he ought at least to have shown that he subsequently made a tender of executing his part of the agreement, which the plaintiff rejected. The defendant, therefore, upon his construction of the agreement, may be entitled to bring a cross action, but has no defence to this.

Platt, *contrà*. The only question is upon the construction of this agreement

It is true, no time of payment was specified, but in the absence of any express stipulation, the money would be payable on demand as often as it became due ; and here the words, " to pay thirty-three shillings per load for each load so delivered," intimate that the price of each load was to be due as soon as it was delivered. (Here he was stopped by the Court.)

LORD TENTERDEN, C. J. I am of opinion that the plaintiff is not entitled to recover. There is, I think, no doubt that by the terms of this agreement the plaintiff was to pay for the loads of straw as they were delivered. If that were not so, the defendant would have been liable to the inconvenience of giving credit for an indefinite length of time, and, in case of non-payment, bringing an action for a very large sum of money, which does not appear to have been intended by the contract. Then the only question is, whether upon the plaintiff's saying, *885] " I will not pay for the goods on delivery" (for *that was the effect of his communication to the defendant), it was incumbent on the defendant to go on supplying straw ; and he clearly was not obliged to do so.

PARKE, J. The substance of the agreement was, that the straw should be paid for on delivery. The defendant clearly did not contemplate giving credit. When, therefore, the plaintiff said that he would not pay on delivery (as he did, in substance, when he insisted on keeping one load in hand), the defendant was not obliged to go on supplying him.

TAUNTON, J. The contract does not say merely that so much straw shall be supplied at thirty-three shillings a load, but it adds, that the plaintiff shall pay that sum " for each load of straw delivered on his premises," from the date of the agreement till the 24th of June, 1830. That *prima facie* imports that each load was to be paid for as delivered.

PATTESON, J. If the plaintiff had merely failed to pay for any particular load, that, of itself, might not have been an excuse to the defendant for delivering no more straw : but the plaintiff here expressly refuses to pay for the loads as delivered ; the defendant, therefore, is not liable for ceasing to perform his part of the contract.

Rule absolute.

*886]

*EVANS v. TRUMAN and Others. Nov. 14.

By the 6 G. 4, c. 94, s. 2, " any person intrusted with and in possession of any bill of lading, India warrant, &c., shall be deemed the true owner of the goods, &c., therein described, so far as to give validity to any contract entered into by such person for the sale of the goods or for the deposit or pledge thereof, as a security for any money or negotiable instrument advanced or given upon the faith of such documents."

A., the owner of certain East India indigo warrants, intrusted them to a broker, without any authority to pledge or sell. The broker pledged them to B. In an action brought by A. against B. for the proceeds of the goods, the broker being called as a witness for the plaintiff, stated that he parted with the warrants to the defendant under a contract which was in writing : Held, that a defendant seeking to avail himself of the statute, must prove his contract with the broker, and, consequently, that it was incumbent on B. to produce the written agreement.

ASSUMPSIT for money had and received by the defendants for the plaintiff's use. At the trial before Lord Tenterden, C. J., at the London sittings after last Michaelmas term, it appeared that the plaintiff, being the owner of certain East India indigo warrants, had placed them in the hands of Nevett and Co., brokers, without any authority to pledge or sell them. Nevett and Co., however, it was alleged, had sold them to the defendants, who had obtained value for them, and the plaintiff sought to recover the proceeds in this action. The plaintiff called Nevett, who stated that he had no authority to sell or pledge the warrants ; and having been asked whether he had parted with them to the defendants, answered he had done so under a contract which he said, on cross examination, was in writing. The defendants' counsel then required the plaintiff to produce it as part of his case ; but it was contended that the plaintiff was not bound to give such evidence. Lord Tenterden said he would reserve the point, but intimated an opinion that the defendants, who sought to avail them-

selves of the statute 6 G. 4, c. 94, s. 2, (a) ought, *in order to give validity to a contract entered into by the broker intrusted with the war- rants, for the sale, deposit, or pledge thereof, to prove the contract itself. The defendant's counsel, however, did not produce it; but commented on the plaintiff's evidence without calling witnesses. The jury found for the defendants, and that Nevett was still indebted to them on the indigo transaction. A rule nisi was afterwards obtained for setting aside that verdict, and entering a verdict for the plaintiff. [*887]

Sir *James Scarlett, Campbell, and Coleridge* now showed case. The question is, who was to prove the contract in this instance. The plaintiff contends that the party receiving the goods is bound to prove his title. But there is no ground for such a position. These warrants are like all chattels which pass by delivery; the person in possession is presumed to have a good title until that is impeached. It is not enough for a party to prove that the property in the goods was his, and that he has not voluntarily parted with the possession; he must show that they have come improperly into the hands of the defendant. In the case of lost bills or checks, there is always some circumstance of suspicion or negligence proved against the holder before he is called upon to account for the possession. How is the case *here? The plaintiff proved that the warrants had belonged to him; that he put them into the hands of the broker, who parted with them for value on a contract in writing which he will not produce. It must be taken that that contract was within the provisions of the act of parliament. It must have been a contract of sale or of pledge, and the particulars could not have been important. If it was a contract of sale, the defendants have a good title under the act of parliament; and if it was a pledge, then, the jury having found that Nevett is still indebted to the defendants on this transaction, there is also a good defence. But if the defendants ought to have proved their title, the Court will not make the rule absolute, but will let the defendants, on a new trial, produce this evidence, seeing that on this trial they were in some degree misled. [*888]

F. Pollock, Jones, Serjt., Joshua Evans, and Wightman, contrd. The defendants made their election at the trial, and must be bound by it. The plaintiff had done enough in proving that the goods had been transferred without his consent or authority. The property in personal chattels in no case passes by delivery without the owner's consent. If the defendants had a title under the act of parliament, it was for them to prove it; as against the plaintiff they were wrongdoers.

LORD TENTERDEN, C. J. I think there ought to be a new trial on payment of costs by the defendants. It appears to us from the provisions of this act, that the persons who would avail themselves of it must prove the contract which they have made. It was, therefore, incumbent upon the defendants here to produce the written agreement. But there is a peculiarity in this case in the *plaintiff's own witness having communicated the fact of the written con- tract, which may induce a belief that the defendants were not aware that it would be necessary for them to give that evidence. They ought, therefore, to be allowed the opportunity of giving it. [*889]

PARKE, TAUNTON, and PATTESON, Js., concurred.

Rule for a new trial on payment of costs by the defendants.

(a) By sect. 2 it is enacted, "That any person intrusted with and in possession of any bill of lading, India warrant, dock warrant, warehouse-keeper's certificate, wharfinger's certificate, warrant, or order for delivery of goods, shall be deemed and taken to be the true owner of the goods described in the said several documents, or either of them, so far as to give validity to any contract or agreement thereafter to be made or entered into by such person so intrusted and in possession as aforesaid, with any person, body corporate, &c., for the sale or disposition of the said goods, or any part thereof, or for the deposit or pledge thereof or any part thereof, as a security for any money or negotiable instrument advanced or given by such person, body corporate, &c., upon the faith of such several documents or either of them. Provided such person, body corporate, &c., shall not have notice by such documents or either of them or otherwise, that such person so intrusted as aforesaid is not the actual and bonâ fide owner or proprietor of such goods so sold or deposited or pledged as aforesaid."

WATTERS v. SMITH. Nov. 14.

B. and C. being jointly indebted to A., the latter sued B. alone. He remonstrated upon the hardship of the case, alluded to circumstances which would probably reduce the plaintiff's demand if he gained a verdict, and proposed to put an end to the action by paying part of the debt, and the costs of suit. This was agreed to, and a receipt given for the sum paid, which was stated to be for debt and costs in that action. A. afterwards sued C. Held, that the composition above mentioned did not operate as a discharge of the whole debt, but only to relieve B., and, therefore, it was no defence for C.

ASSUMPSIT for work and labour, care, and attendance. Plea, non assumpsit. At the trial before Lord Tenterden, C. J., at the London sittings after Michaelmas term 1830, it was proved that the plaintiff had been appointed to the situation of assistant surgeon and apothecary in a certain institution called The Royal Western Hospital, which was under the management of a committee. The defendant and George Hunter were both members of this committee. The plaintiff had claimed from the defendant, by a letter before the action, 43*l.* 16*s.* as the whole amount of his demand; in the action, however, his claim was reduced to 28*l.* 16*s.* It was proved, on the part of the defendant, that the plaintiff had already sued Hunter for the whole of the same demand. On the 1st of May, 1830, Hunter's attorney addressed the following letter to the plaintiff's attorney:—

*890] “Sir,—With reference to our conversation yesterday, I send you underneath (without prejudice) the *terms upon which I propose to compromise this suit. I think it however but fair to premise, by representing to you the peculiar hardship of the case as regards Mr. Hunter. You have, unfortunately, fixed upon the very one of all the committee who knew least of the affairs of the hospital, or of the parties connected with it; who subscribed to it (as he does to many other public charities in the metropolis) solely from motives of charity, and only consented to act on the committee at the particular solicitation of a friend, who was rather more eager in the welfare of the institution than the little personal interest he had in it required. I am not in general fond of appealing to the feelings, but I do think this is one of those cases in which such circumstances should be considered and have weight. Should, however, your client think otherwise, and persist in his endeavour to exact his demand to the fullest extent that the strictness of the law will give him, from this defendant, when there are so many others equally responsible, and upon whom the claim would with much more justice be made, I must beg you to remind him of the circumstances I stated in conversation to you yesterday, which, supposing him to obtain a verdict in his favour, would so considerably reduce it in amount. I propose, therefore, to put an end to the action by paying down 15*l.* and the costs of suit, upon receiving a proper discharge. Such sum would, even then, be five or six times more than the amount of Mr. Hunter's proportion of the demand.”

The plaintiff having agreed to stay the action against Hunter on receiving 15*l.* and his costs, that amount was paid, and the following receipt was given by the plaintiff's attorney:—

*891] “Received, 10th May, 1830, of the defendant, the sum of twenty pounds fourteen shillings and sixpence, being the amount to be taken for debt and costs in this action.”

A declaration had been filed, and a rule to plead given; but after this payment no further proceedings took place. It was urged for the defendant, that the plaintiff, having accepted a composition from Hunter, could not now sue any other person liable to the same debt, but that it was wholly discharged. Lord Tenterden, however, was of opinion that the transaction operated only as an arrangement for the relief of Hunter. A verdict having been found for the plaintiff, in Hilary term last a rule nisi was obtained for a new trial.

R. V. Richards now showed cause. The payment of the money in the former action was no bar to the plaintiff's claim in the present. It was only a fair arrangement that Hunter should pay his portion of the debt, and not be driven

to sue the other persons, who were jointly liable, for a contribution. This payment could not be pleaded in bar in any way, for there has been no judgment, and no rule of Court for a discontinuance or for the payment of the money to the plaintiff. In point of law the plaintiff might still proceed against Hunter; for payment of a less sum of money cannot be satisfaction of a larger. The plaintiff's receipt would not have prevented his suing for the balance, *Fitch v. Sutton*, 5 East, 230. There the terms of the receipt were still stronger than in the present case. Then if the action against Hunter *has not been barred, still less can Smith avail himself of the transaction in discharge [*892 of the present claim. This point was considered in *Power v. Butcher*, 10 B. & C. 329; but did not properly arise, and was not decided. In Com. Dig. *Audita Querela* (A), it is stated, "If upon a joint trespass by A. and B. there be a recovery against A. in C. B. upon a declaration in London, and against B. in B. R. upon a declaration in another county, and A. *pays the whole*, B. after he is taken shall have an *audita querela*." There must be an entire payment of the whole. [Lord TENTERDEN, C. J. The mere recovery against one will not do.] There was no intention on the part of the plaintiff to give a discharge of the whole debt; an offer was made to him to accept a sum as Hunter's proportion, and he assented to it.

F. Pollock, contra. *Fitch v. Sutton* does not apply; but the present case is more analogous to *Longridge v. Dorville*, 5 B. & A. 117, where it was held that the giving up of a suit instituted to try a question respecting which the law is doubtful, is a good consideration for a promise to pay a stipulated sum. So here Hunter may have intended to contest his liability, at least as to the whole amount; and that being a matter of doubt may have formed the ground of the plaintiff's agreement to take the smaller sum. If so, this is clearly a discharge of the whole debt; and if the suit had been continued, might have been pleaded by Hunter *puis darrein continuance*; and though there has been no formal conclusion of that action, yet it must be allowed that it was ended. Then if in this action against Smith, he had pleaded in abatement the *non-joinder of [*893 his partner Hunter, and the plaintiff had commenced a fresh action against them both, Hunter could have pleaded this matter in discharge, and must have succeeded. It is clear, therefore, that Smith may now say the whole debt has been satisfied. The case of trespass, where the liability is joint and several, does not apply here. If the present plaintiff intended to keep the other parties liable, he should have made an express reservation of his rights as against them.

Lord TENTERDEN, C. J. This is the case of a plaintiff having a demand against several persons, all of whom he might have sued jointly, or any one separately, subject to a plea in abatement. He sued one, namely, Hunter, alone, who did not plead in abatement; and since then another, namely, the defendant, who likewise has not pleaded in abatement. Hunter being sued, his attorney wrote a letter, stating the hardship of his client's being compelled to pay the whole debt, and offering to pay a proportional share. This offer was accepted, and the plaintiff gave a receipt for debt and costs in that action. He then commenced this suit against the defendant for the balance. It is contended that the debt is already discharged, but the question is, whether the plaintiff intended to discharge the whole debt, or only to relieve the party proposing to pay a proportion of the debt. I think the former construction would be hard and injurious. Where several persons are liable for the whole, it is by no means unusual for a creditor to accept proportionate shares from some, and take his remedies for the rest against the others. And there is nothing unjust in this. The composition between the plaintiff and Hunter will not relieve the latter from contribution to Smith, if he is compelled to *pay a larger proportion than would [*894 have been due as between the parties. It can in no manner operate to his prejudice, but must rather be to his benefit, inasmuch as the plaintiff recovers a less sum from him by the present action than would otherwise have been claimable. It would make the act of the plaintiff operate directly contrary to his

intention, and also to justice, if we were to hold that it was in point of law a discharge of the whole debt. The rule for a new trial must, therefore, be discharged.

PARKE, J. It is not necessary to consider what would have been the effect of the payment of 20*l.* if it had been made in full satisfaction of the demand against Hunter. If the case rested upon this, it might be a bar to the action, on the authority of *Longridge v. Dorville*, 5 B. & A. 117. But I think that question does not arise here from the facts. Looking at the terms of the agreement as contained in the letter from Hunter's attorney, and the receipt, it is manifest that the payment was not made in discharge of the plaintiff's rights against all other parties; and the result of the whole is, that it does not operate as a release, or matter which could have been pleaded as an accord and satisfaction, but amounts merely to an engagement not to sue Hunter, which can only be pleaded by himself; if the action, therefore, had been brought against two parties, it would not have been a discharge to both. Or, it may be considered as a release to one, qualified by a reservation of the plaintiff's rights against the other, as in *Solly v. Forbes*, 2 Br. & B. 38. The rule, therefore, must be discharged.

*895] *TAUNTON, J. A release given to one of two joint contractors, enures to the benefit of both: so a judgment and satisfaction as to one, is a stay of proceeding against the other. But here has been neither release nor judgment, nor is there any evidence of an accord and satisfaction of the debt either with reference to Hunter or the defendant. When the case was moved, it was stated that the language of the receipt purported that the money was paid in discharge of the whole debt and costs, and, therefore, that which was a discharge of Hunter in that action would operate as such for the defendant in this. But on looking at the words of the receipt itself, it is only an acknowledgment of money having been paid in the course of that suit, on the receipt of which the plaintiff agreed to rest satisfied, and not proceed farther against Hunter. It is no release; and *Fitch v. Sutton*, 5 East, 280, decides that such a payment was not a satisfaction, especially of Smith's debt, whose name was never mentioned.

PATTESON, J. It is clear from the evidence that the plaintiff accepted the money, not in discharge of the debt, but to relieve the defendant in that suit. *Longridge v. Dorville* does not apply; that case only proves that the giving up a suit which turns upon a doubtful point of law may be a good consideration for a promise to pay stipulated damages. But there the agreement was, that there should be a final settlement of the whole matter; whereas here nothing of that kind was understood.

Rule discharged.

*896] *DOE dem. HENRY DYMOKE *v.* WITHERS. Nov. 15.

Testator devised a messuage and premises to his son for life, with power to demise for sixty-one years, "for the purpose of new building or effectually re-building and repairing any messuage, &c., being or to be on the premises." The son granted a lease for that term, in which the tenant covenanted to expend 250*l.* at least, for the purpose of effectually repairing the messuage and premises, to the lessor's satisfaction; and he also covenanted when the same should be so well and effectually repaired as aforesaid, to repair and uphold the same as need should require, during the term.

On ejectment brought after the son's death by the remainder-man against the lessee:

Held, that this lease was not a good execution of the power, inasmuch as a covenant effectually to repair (if the above-mentioned covenant were such) was not equivalent to a covenant effectually to rebuild and repair.

And, assuming that an obligation on the tenant to repair effectually would have satisfied the power: Held (PARKE, J., and TAUNTON, J., doubting), that the present covenant would have been insufficient.

EJECTMENT for a messuage and premises in the parish of St. Clement Danes, Middlesex. At the trial before Lord Tenterden, C. J., at the sittings at Westminster after Trinity term 1829, the plaintiff was nonsuited. A new trial was afterwards moved for, and the rule was made absolute, but leave given to the

parties to turn the facts into a special case for the opinion of this Court, the verdict to be entered according to their decision. The case was as follows:—

The lessor of the plaintiff claimed under the will of John Dymoke, who had devised the premises, in trust, first, for his eldest son Lewis Dymoke during his life, and then (after certain remainders) to the use of John Dymoke, the testator's second son, for his life; and afterwards to the use of the first son of the last-mentioned John Dymoke, and the heirs male of the body of such first son. Lewis Dymoke died without issue. The lessor of the plaintiff was the first son of John Dymoke the younger, who was also dead.

The testator by his said will directed that it should be lawful for any person taking a life estate under the will, and being in possession, to demise all or any part of the messuage and premises in question, **“for the purpose of new building or effectually rebuilding and repairing any messuage, houses, outhouses, edifices, or buildings now standing or being, or hereafter to stand and be upon any of the said last-mentioned hereditaments and premises,”* for any term not exceeding sixty-one years, to take effect in possession and not in reversion or remainder; so as upon every such lease, &c., there should be reserved during the continuance thereof as much or as beneficial yearly rent or rents, to be incident to the immediate reversion, as could be reasonably obtained without taking any fine. The will also empowered such tenant for life, *“for any other reasonable purpose,”* to demise the premises for any term not exceeding twenty-one years, to take effect in possession, at rack-rents, so that the leases should contain such covenants, clauses, and restrictions as are usual in leases of houses at rack-rents in London. There was also a clause providing that, if any person taking a life-estate under the will, and in possession or entitled to the rents, should not keep the estates in good, sufficient, and substantial repair, a trustee might enter, take the rents and profits, and apply them in putting the premises in good and sufficient repair.

The defendant held possession as assignee of a lease granted by Lewis Dymoke to Thomas Fish, by which Lewis Dymoke, *“in consideration of the great charges and expenses which the said Thomas Fish would be at in effectually repairing the messuage, tenement, and premises”* thereby demised, and also of the rent reserved, and of the covenants, conditions, and agreements on the part of Fish thereafter contained, demised the premises in question to the said Fish for the term of sixty-one years, at the yearly rent of 27*l.* And Fish covenanted that he, **his executors, &c.,* would, on or before the 25th of December next ensuing, expend in, about, and upon the demised premises *“250*l.* at least,* for the purpose of effectually repairing the said demised messuage and premises, and putting the same and every part thereof into complete and substantial repair, to the good liking and satisfaction of the said Lewis Dymoke and his assigns,” &c., or their surveyor; *“and when the said demised premises and every part thereof should be so well and effectually repaired as aforesaid,”* he, Fish, his executors, &c., would at all times during the term, as often as need should be, well and sufficiently repair, uphold, &c., the premises, and all buildings, &c., to be erected thereon. It was also provided that Fish might determine the lease at the end of thirty-one years, giving notice and performing all the covenants. There was no express covenant on the part of Fish to new build or rebuild any part of the premises. The value of the premises at a rack-rent (exclusive of land-tax and sewer's rate) was 100*l.* a year. The question for the Court was, whether the above lease was valid, under the power of demising for sixty-one years, given by John Dymoke's will? This case was now argued by

Walsh for the plaintiff. A power is to be expounded strictly, *Com. D. Poier, B. 1*; especially where an act is to be done which affects the interest of the party next in remainder; *Taylor v. Horde, 1 Burr. 60, Campbell v. Leach, Amb. 740*; and, as Lord Mansfield says in the former of these cases (p. 120), the construction must be governed by the intention of him who created the power. A **tenant for life, with power to demise, has no capacity of doing so, except in the form prescribed; if that be departed from, the lease is bad in its* [899]

very creation. Doe dem. *Ellis v. Sandham*, 1 T. R. 705. Now the intention here must have been, that when so long a term as sixty-one years was granted, it should be in consideration of a covenant to rebuild as well as repair. The words are, "new building, or effectually rebuilding and repairing." If rebuilding means the same as new building, no question can arise; and if they differ in meaning, still a covenant to rebuild and repair must signify more than one to repair merely. And if repairing only was intended by the terms of this power, there appears no reason for the separate power to demise for twenty-one years at a rack-rent under the usual covenants, which, of course, would include a covenant to repair. It was evidently the testator's object that the mere repairs should be done by each tenant for life during his own holding: the power of entry given to the trustees is a sufficient proof of this. Assuming it then to have been a condition of the power to demise for sixty-one years, that the leases for that term should be building leases, Jones dem. *Cowper v. Verney*, Willes, 169, is a case in point for the plaintiff.

Follett for the defendant. It was not necessary to the right execution of this power that the leases for sixty-one years should be building leases. The words "new building, or effectually rebuilding and repairing," express different operations (though, according to the argument on the other side, they would be *900] *almost undistinguishable); but the latter part of the alternative has not the sense contended for. New building means pulling down and building up again from the foundation; effectually rebuilding and repairing only expresses, in a strong manner, the putting into substantial repair. "To rebuild," is explained in Johnson's Dictionary as signifying "to re-edify, to restore from demolition, to repair;" and in a passage there cited from Lord Clarendon, mention is made of fines appropriated to the "*rebuilding and repairing* of St. Paul's church," which, at the time spoken of, was not in a state that required *new building*. [PARKE, J. Suppose in this case it had become necessary that some part of the premises should be entirely rebuilt; would the lessee have been bound to do that under a covenant to repair?] It may be contended that he would; as a tenant is in case of fire, under the covenant to repair in a common lease. It was asked on the other side, what distinction there was between the powers to demise for sixty-one and for twenty-one years, if the tenant was not to be bound in the one case to do more for the premises than in the other. But it is sufficient to say in answer, that the tenant for sixty-one years in the present instance is expressly subjected to a much heavier burden than would necessarily be imposed by a lease under the common covenants; namely, the obligation to lay out 250*l.* in repairs. In Jones dem. *Cowper v. Verney*, Willes, 169, the term "rebuilding" was clearly explained by the recital of the private act of parliament in which it occurred: and the lease there granted contained little more than the common covenants. [Lord TEN- *901] TERDEN, C. J. As the case is now *put, there is still this difficulty, that instead of taking a covenant effectually to repair, the lessor only covenants for 250*l.* to be laid out; non constat that that is sufficient.] It is that sum "at the least," and the repairs are to be done to the satisfaction of the lessor and his assigns. [Lord TENTERDEN, C. J. The mention of 250*l.* limits the amount.] If that sum was insufficient, it was for the plaintiff to show it, since he took upon him to set aside the execution of the power. [PARKE, J. The objection is not that the sum stipulated was in fact too small, but that the covenant taken was for laying out a limited sum, and not, in general, for effectually repairing, according to the terms of the power.] If it was shown by evidence that the sum named was more than sufficient, the lease would have been supported; for it would have appeared that the lessor had, substantially, provided for the effectual repair of the premises, as required by the power.

Walsh in reply. There should have been a covenant expressly obliging the lessee to do all that was necessary for repairing the premises. An agreement to pay a stated sum is not equivalent to such a covenant, though the sum should be more than sufficient.

LORD TENTERDEN, C. J. It is to be lamented that the party granting this lease was not more careful to pursue the form of the power. The defendant says that the conditions have in substance been complied with; but I think that is not so. "Effectually rebuilding and repairing" must mean something more than "effectually repairing." The first might be understood to signify repairing those parts which merely needed repair, so that they might stand the remainder of the *term, and rebuilding those which were not otherwise repairable: [*902 the other might imply merely putting the whole into the best state which its then condition allowed of. I must also say that the stipulation introduced into this lease, and relied upon by the defendant, is not equivalent to a general covenant effectually to repair; for under this agreement it would be enough if the tenant laid out 250*l.* upon the premises to the best advantage, whether that sum were sufficient for effectually repairing them or not. This lease, therefore, was not answerable to the only object for which the tenant for life was authorized to grant it.

PARKE, J. To rebuild might mean to pull down entirely, and re-edify in the same shape as before; or it might signify rebuilding some parts and repairing the rest: but taking it in either way, rebuilding and repairing must be something different from repairing merely; and this lease cannot be supported unless they mean the same. As to the other objection, that a covenant to lay out 250*l.* is not equivalent to a general covenant to repair, if the decision had necessarily turned upon that, I should have thought it would be desirable to ascertain whether 250*l.* was sufficient for effectually repairing; because, assuming that the power only required a demise of the premises for the purpose of a *bonâ fide* repair, then, if 250*l.* were adequate to that purpose, I am not clear that the power would not have been sufficiently well pursued. But it is immaterial to decide this, the lease being invalid on the other ground.

TAUNTON, J. I am also of opinion that this covenant was not answerable to the testator's intention. I think his meaning was, that the lessee should be bound by an *obligation, capable of being enforced, to build the premises [*903 anew if necessary, or if not, then effectually to rebuild and repair such parts as might require rebuilding or repairing. There is a clear difference between covenants to repair, and to build anew. It has been doubted whether, if a lessee pulled down the house demised, though for the purpose of rebuilding, he was not liable for waste; I do not know, therefore, that under ordinary covenants, the lessee would have been obliged to incur that risk. But by a covenant to "new build," provision is at once made for the protection of the lessee, if it should be desirable to take the premises down, and also for the benefit of the lessors. The construction which we put upon this power is strengthened by the terms of the other power, to let for twenty-one years, in which the condition is only, that the lease contain the covenants usually inserted in the lease of a house in London at a rack-rent. In those leases the tenant merely covenants to repair. Now, if the testator meant to require nothing more than this in the leases for sixty-one years, there is no difference as to the extent of obligation imposed, between the power to demise for sixty-one, and that for twenty-one years; and it does not appear why there should have been distinct powers for the two terms. As to the question whether the covenant to lay out 250*l.* might or might not be sufficient if a covenant to repair merely would satisfy the power, I have some doubt. By the terms of this lease, the minimum to be laid out is 250*l.*; and that is said to be for the purpose of effectually repairing the premises, and putting every part of them into complete and substantial repair to the satisfaction of Lewis Dymoke and his assigns. The lease then goes on to require that *when the premises, and every part thereof, shall be "so well and effectually repaired as aforesaid," the lessee shall at all times well and sufficiently [*904 repair and uphold them. So that the deed in the first place assumes an obligation on the tenant effectually to repair, and then imposes on him the charge of upholding and keeping in repair. Whether this amounts in substance to a covenant effectually to repair (if that alone were required), it is not necessary to

decide, because there is a complete objection to the lease, upon the distinction between "repairing" and "rebuilding and repairing."

PATTESON, J. I am of the same opinion upon the difference between the terms "repair" and "rebuild." If the addition of the latter term would have made no difference in the obligation of the lessee, it is unfortunate that it was left out of the lease, since no objection could have been made to its introduction. But I think the effect of the two words together is, that the tenant shall rebuild such parts of the premises as require rebuilding, and repair such parts as need only repair. On the other point I entertain a stronger opinion than my Brother TAUNTON, for whatever construction may be given to the covenant to lay out 250*l.*, I think the remainder-man was entitled to the benefit of a covenant which should leave no doubt as to the extent of the lessee's obligation. There should have been an absolute covenant to put the premises into effectual repair.

Postea to the plaintiff.

***905] *CARR, Administratrix, &c., of JOSEPH WALKER, v. ROBERTS.**

The 55 G. 3, c. 184, schedule, part 3, imposes an *ad valorem* duty on letters of administration where the estate is above 20*l.* in value, exclusive of what the deceased shall have been possessed of or entitled to as a trustee, and not beneficially. An intestate had granted an annuity to A., and afterwards by deed conveyed his property to B., who covenanted to indemnify him against the payment of the annuity. Default having been subsequently made in the payment during the intestate's lifetime, the annuitant sued his administratrix, and recovered judgment for debt and costs exceeding 20*l.* The administratrix paid this, and then sued B. on his covenant for the amount: Held, that the right to recover this sum was a part of the intestate's estate, and rendered the letters of administration liable to stamp duty; and that the intestate, if he had lived, could not have been considered, in respect of this sum, as a mere trustee for the annuitant, and having no beneficial interest.

COVENANT. The action was brought on a deed, whereby the intestate assigned all his real and personal property to the defendant, in consideration of an annuity to be paid to him for his life, and also of the defendant's taking upon himself the payment of all debts due from the intestate, and of an annuity previously granted by the intestate to one Ann Smith. The declaration stated a covenant by the defendant to indemnify the intestate against the payment of (among other debts) this annuity, and assigned as a breach, that the sum of 500*l.* was due from the intestate during his lifetime for arrears of this annuity, and that the defendant did not pay those arrears, nor indemnify the intestate, and the plaintiff since his death, against them. The defendant pleaded, among other things, that the plaintiff was not administratrix,^(a) &c. At the trial before Lord Tenterden, C. J., at the Middlesex sittings after last Hilary term, it appeared that the annuity was in arrear for the time stated in the declaration, and Ann Smith, the annuitant, had brought an action against the plaintiff, to which she had confessed assets to the amount of 20*l.*; and Ann Smith had taken judgment for that sum immediately, and a judgment of *assets* *906] *quando* for the remainder. The costs in that action were 14*l.*, *and these and the 20*l.* had been paid. There was no evidence of any assets beyond the 20*l.* so confessed; and the letters of administration had no stamp, none being necessary unless the estate were above the value of 20*l.* It was objected for the defendant, that the sum to be recovered in the action was part of the intestate's property, and ought, therefore, to have been included in the valuation of the estate; and that if it had been included, a stamp would have been necessary. *Hunt v. Stevens*, 3 Taunt. 113, was cited. On the other hand, it was contended, that a mere contingent right to recover damages, which this was at the time of taking out the administration, could not be taken as part of the intestate's estate; and, further, that if the intestate in his lifetime, had recovered against the defendant, he must have held the proceeds only as a trustee for the annui-

(a) See 2 M. & M. 45.

tant, and the plaintiff, if she recovered, was in the same situation; and property held merely in trust was expressly exempted by the statute 55 G. 3, c. 184, sched. part 3. Lord Tenterden was of opinion that such a contingent interest was not a matter capable of valuation as part of the estate, and therefore that the letters of administration did not require a stamp. It was then contended that the plaintiff was entitled to recover not only the debt and costs actually paid in the action brought by Ann Smith, but the whole sum for which she had recovered judgment against the plaintiff of assets quando acciderint. Lord Tenterden directed the jury to find a verdict for 34*l.* only, but reserved liberty to the plaintiff to move to increase the damages. A rule nisi having been obtained for that purpose, or for a new trial,

**John Williams* now showed cause, and contended that the plaintiff not only was entitled to no increase of damages, but ought to have been nonsuited. He again relied on *Hunt v. Stevens*, 3 Taunt. 113, and observed that, in that case there was nothing to raise the amount of assets to the value which rendered a stamp necessary, except the sum claimed, but not yet recovered, by the administrator. [*907]

Campbell and White, contrâ. By the express words of 55 G. 3, c. 184, sched. part 3, the administrator of one who is merely a trustee is exempted from the payment of duty on the probate. Here the plaintiff has no interest in the sum when recovered. She only sues as trustee for Ann Smith. [PARKE, J. In order to come within the exemption, the *intestate* must be a trustee.] The intestate, if he had lived, and had sued upon this covenant, would have been a trustee for the annuitant. In *Hunt v. Stevens* the administrator would have recovered for his own benefit. In the present case, whatever the plaintiff may recover will be assets in her hands for the benefit of Smith.

LORD TENTERDEN, C. J. I am of opinion that, according to the authority of *Hunt v. Stevens*, 3 Taunt. 113, there was no sufficient stamp upon the letters of administration. And it appears to me that the present is not a case within the exemption contained in the stat. 55 G. 3, c. 184, sched. part 3. The words are, "Where the estate in respect of which letters of administration shall be granted, or whereof such inventory shall be exhibited *and recorded, [*908 *exclusive of what the deceased shall have been possessed of or entitled as trustee for any other person, and not beneficially,* shall be above the value of 20*l.*" This provision was made for the exemption of mere trustees, as where property is mortgaged in trust; in which case, if the mortgagee's representative were bound to pay the whole amount of the duty, great injustice would be done. I cannot think that Walker, the intestate, stood in the position of a mere trustee, for he had a beneficial interest in the covenant, since he was liable in the first instance to Smith, and had an interest in obtaining payment of her annuity from the defendant, to relieve himself. The rule, as to increasing the damages, must be discharged, but it may be made absolute for a new trial, on payment of the costs of the former trial, in order to give the plaintiff an opportunity of taking out letters of administration with the proper stamp.

PARKE, J. The exemption applies to trustees having no beneficial interest. Here the intestate had an interest in the payment of the annuity.

TAUNTON and PATTESON, Js., concurred.

Rule absolute for a new trial.

Letters having arrived at a post-office, addressed to a party who had become bankrupt, the assignee (in that character) demanded them of the postmaster; and he, believing *bonâ fide* that the assignee was entitled to have them for the purposes of the commission, delivered them up; this having been the practice of the office, under similar circumstances, for more than thirty years: Held, that the postmaster was not liable under the act 9 Ann. c. 10, s. 40, for *wittingly, willingly, and knowingly* detaining letters, and causing them to be detained and opened.

THIS was an action of debt against the postmaster of Liverpool for penalties under the statute 9 Ann. c. 10, s. 40.(a) The declaration charged that the defendant *having a certain office and employment in the post office, did, *910] without the consent or license of the plaintiff, wittingly, willingly, and knowingly detain and delay, and cause, procure, permit, and suffer to be detained and delayed, a letter directed to and intended for the plaintiff, and which had come into and was in the hands and custody of the defendant by reason of his said employment, after such letter had been delivered into the said post-office for the purpose of being delivered to the plaintiff, and before the same had been delivered to the plaintiff or for his use; and without any of the excuses mentioned in the fortieth section of the statute, all which were negatived by the declaration. There were separate counts for causing, and for permitting, a letter to be *detained and delayed*; and others, for causing and for permitting a letter to be *opened*, contrary to the statute; and there were two other sets of counts, relating to other letters. The defendant pleaded the general issue. At the trial before Parke, J., at the Lancaster Spring Assizes 1830, a verdict was taken for the plaintiff for three penalties (on such of the counts as should be afterwards agreed on), subject to the opinion of this Court upon the following case:—

*911] *In May 1829, a commission of bankrupt was issued against the plaintiff, who had before that time carried on business as a merchant at Liverpool; and on the 19th of June, Mr. Harbottle, a merchant of Manchester, was appointed sole assignee. On the 23d of June Mr. Harbottle wrote to the defendant, and informed him that he (Harbottle) was appointed assignee of the plaintiff's estate, and in that character required the defendant, as postmaster, to forward to him (Harbottle) any letters that might be addressed to the plaintiff. The defendant forwarded to Mr. Harbottle by return of post, three letters which were the subject of this action, and which had been lying in the Liverpool post-office for some days in a letter-box kept there for the plaintiff's use, and in which, by an arrangement with the postmaster, it had been the practice to put any letters directed to him. The case stated, that in so forwarding them, the defendant acted *bonâ fide* under a belief that Mr. Harbottle, as assignee, had the absolute property in such letters, and was entitled to demand the possession of them, to open and use them for the purposes of the commission; and it was added that the defendant had no other motive or reason for delivering them up. The three letters so forwarded were opened and read by Mr. Harbottle, but the contents did not appear to relate to the bankrupt's estate, trade, or dealings, or to any matter in which his assignee or creditors had an interest. Mr. Harbottle afterwards delivered them to the plaintiff. It was proved to have been the usage of the post-office at Liverpool, for thirty or forty years before this transaction, to

(a) Entitled, An Act for establishing a General Post-Office for all Her Majesty's Dominions, &c., sect. 40, is as follows:—"And whereas abuses may be committed by wilfully opening, embezzling, detaining, and delaying of letters or packets, to the great discouragement of trade, commerce, and correspondence; for prevention thereof be it enacted, &c., that from and after, &c., no person shall presume wittingly, willingly, or knowingly to open, detain, or delay, or cause, procure, permit, or suffer to be opened, detained, or delayed, any letter or letters, packet or packets, after the same is or shall be delivered into the general or other post-office, or into the hands of any person or persons employed for the receiving or carrying post letters, and before delivery to the persons to whom they are directed, or for their use; except by an express warrant in writing under the hand of one of the principal secretaries of state for every such opening, detaining, or delaying; or except in such cases where the party or parties to whom such letter or letters, packet or packets, shall be directed, or who is or are hereby chargeable with the payment of the port or ports thereof, shall refuse or neglect to pay the same; and except such letters or packets as shall be returned for want of true directions, and where the party to whom the same is or are directed, cannot be found; and that every person offending in manner aforesaid, or who shall embezzle any such letter or letters, packet or packets, shall for every such offence forfeit the sum of 20*l.*," to be recovered by action, &c. (as pointed out in the clause), by such persons as will inform or sue for the same; "and over and above such penalty as aforesaid, every such person so offending as aforesaid shall be for ever incapable of having, using, exercising, or enjoying any office, trust, or employment in or relating to the post-office, or any branch thereof."

By sect. 41, it is enacted, "that no person shall be capable of exercising any employment relating to the post-office until he shall have taken an oath that he will not wittingly," &c. (in the terms of sec. 40), detain, delay, &c., any letter or packet which shall have come to his hands by reason of his employment in the post-office, except in the cases before specified (which are particularly set out in the oath), and that he will not embezzle any such letter or packet.

deliver all bankrupts' letters to their assignees, if *required by them, and to continue such delivery till the assignees gave counter-orders. This [*912 proof was objected to as inadmissible, and was received, subject to such objection.

In the year preceding his bankruptcy, the plaintiff had gone from Liverpool to South America. He had never returned to Liverpool, but was in London for some time before the issuing of the commission. He was arrested there on the 9th of May, 1829, and remained in the King's Bench prison till the 20th of June following. On the 9th of June, a friend of the plaintiff called at the Liverpool post-office by his direction, applied for his letters, and received some which were then lying there for him, directed them to the plaintiff in London, and re-delivered them to the clerk in the post-office. There was no further proof that the defendant, at the time of the transaction with Harbottle, knew where the plaintiff resided. The defendant, in a letter to the plaintiff of the 1st of August, 1829, stated that he had seen the letters which were the subject of this action, remaining in the office, had been aware of the causes which prevented the plaintiff's applying personally for them, and had cautioned the clerks against delivering them to any unauthorized person. It did not appear that, from the time of their arrival till they were applied for by the assignee, any other person had inquired for them.

If the Court, under these circumstances, thought the penalties not recoverable, a nonsuit was to be entered. The case was now argued by

Tomlinson for the plaintiff. Two questions arise upon this case. The first is of great and general *importance, namely, whether assignees of a bankrupt [*913 have a right to intercept his letters at the post-office, on the chance that they may contain matters relative to the estate; the act making no exception in favour of assignees, and there being, as the plaintiff contends, no right of property in them upon which such a claim can be grounded. (a) The second question, assuming the law to be with the plaintiff on the first, is, whether the acts of the defendant are offences to which the penal clause, 9 Ann. c. 10, s. 40, is applicable. [Lord TENTERDEN, C. J. It will be better to take that question first. Were these acts committed "wittingly, willingly, and knowingly," within the meaning of the statute, being done *bonâ fide*, and in pursuance of a long-established practice?] The statute must be construed as imposing the penalties, not merely where the act is done from a corrupt motive, but also where the officer, presuming on his own judgment, sets up a title to the letters, at variance with that of the party to whom they are addressed. It never was intended by the statute to vest a discretion in him, which might be productive of so much inconvenience. The preamble of the clause certainly recites that *abuses* may happen; but there are no words in the enacting part which render a corrupt intention necessary to constitute the offences provided against. The words "suffer to be opened," which describe the offence here charged, imply nothing more than mere knowledge. [Lord TENTERDEN, C. J. Why are the words "wittingly, willingly, or knowingly," *introduced?] The words "wit- [*914 tingly," and "knowingly," are to exclude cases of mere carelessness or mistake; "willingly," may have been meant to excuse acts done under constraint or necessity. The language of the oath (s. 41) is distinct, and embodies all the exceptions allowed by the act; the defendant has taken upon him, by virtue of a practice established, it does not appear how, to engraft a new exception on the terms of the statute. He cannot excuse himself by alleging ignorance of the law; for the words of the act which refer to knowledge, only signify knowledge of the facts. That the defendant had; and he was bound to perform his duty according to a right understanding of the statute.

F. Pollock, contra, was stopped by the court.

Lord TENTERDEN, C. J. The words "wittingly, willingly, or knowingly," in this penal clause, must have been introduced with some view: if we suppose

(a) As to the property in letters, and the rights which different persons may have in the same, see *Lord and Lady Percival v. Phipps*, 2 Ves. & Beames, 19, and *Gee v. Pritchard*, 2 Anst. 402, and the authorities referred to in those cases.

them to have no particular meaning, it would have been sufficient, without adding more, to impose the penalty on any person opening or detaining letters, or suffering them to be opened or detained. Then, if these words have a meaning, we must look for the explanation of them, first, to the preamble of the clause in question; and that recites that *abuses* may be committed by wilfully opening, embezzling, and detaining letters. The enacting part states what shall be the consequence of so doing, namely, that the person so *offending*, or *who shall embezzle any letter*, shall, for every such offence, forfeit 20*l.*, to be recovered by a *qui tam* action; and, over and above such penalty, shall be for ever incapable *915] of exercising any office, trust, or employment in or relating *to the post-office. Now, in the interpretation of an act so highly penal on the party *offending*, we must be careful to adopt such a construction as will strictly answer to the intention expressed by the legislature: and so construing the clause in question, it seems to me that the words “wittingly, willingly, or knowingly,” must be taken to denote acts done with a conscious mind that the party is doing wrong. If so, it is clear that the plaintiff cannot recover; for the case states that, in delivering up these letters, the defendant acted *bonâ fide* under an impression that he was performing his duty; and he might think himself warranted in that opinion, by the practice which had prevailed for thirty or forty years.

PARKE, J. In an action for penalties, and where a judgment against the defendant would be attended with such serious consequences, the law must be strictly construed: and I think we must consider the fortieth section of this act as applying to cases where the officer knowingly and willingly does what is wrong; not, therefore, to that of a postmaster delivering letters to a person who, as he believes, has a right to demand them. So, in *Wright v. Smith*, 5 Esp. N. P. C. 203, which was an action by a landlord against a tenant for double value, under the statute 4 G. 2, c. 28, it was determined by the Court of Exchequer, that a holding of the premises by the tenant without fraud, and under a fair claim of right, was not a *wilful* holding over within the statute.

TAUNTON, J. The clause here in question does not render it absolutely *916] necessary that the letters should be *delivered to the person whose address they bear: if they are delivered for his use, the penalties do not attach. In this case the defendant *bonâ fide* believed that, in delivering the letters to the assignee, he was delivering them for the use of the bankrupt or of his estate: and I think the clause does not apply where the letters are given to a person claiming under a colour of title.

PATTESON, J. The statement in the case being that the delivery of the letters was *bonâ fide*, I think it cannot be said that the defendant acted “wittingly, willingly, and knowingly” against the statute. Nonsuit to be entered.

HOPKINS v. THOROGOOD. Nov. 15.

By a turnpike act a certain toll was to be taken at every turnpike on the road from W. to O., for four horses drawing any carriage, &c.

A subsequent section provided, that no person should pay toll more than once in the same day for passing or repassing with the same horses or carriages, through any of the turnpikes, but that every person after having paid toll once, and producing a ticket, should pass with the same horses and carriages toll free during such day.

Held, that a second toll was payable for passing on the same day two toll gates on the road, with the same carriage, but drawn by different horses; for that the clause imposing the toll was clear, and the exempting clause either meant that the horses should be the same, or was too ambiguous to control the previous enactment.

ASSUMPSIT by the lessee of tolls. At the trial before Lord Tenterden, C. J., at the Middlesex sittings after Trinity term 1829, a verdict was found for the plaintiff, subject to the opinion of this Court upon the following case:—

By 4 G. 4, c. 106, s. 19, certain tolls were imposed, to be taken at every

turnpike on the road from Whitechapel to Ongar, and amongst others the following:—"For three or four horses, or other beasts of draught, drawing any coach, chariot, chaise, berlin, landau, calash, hearse, or pleasure carriage, 1s." By *the twentieth section it is provided, "that no person shall pay toll more than once in the same day for passing or repassing with the same [*917 horses, cattle, beasts, or carriages, through all or any of the turnpikes or toll-gates, &c.; but that every person, after having paid toll once as aforesaid, and producing a note or ticket denoting the payment of such toll, shall afterwards pass with the same horses, cattle, beasts, and carriages toll free during that day, through all and every the gate and gates," &c. By the twenty-first section it is enacted, "that for all horses, &c., drawing any stage-coach, carrying passengers or goods for hire, for which toll shall have been paid, and which shall return on the same day through the same turnpike or toll-gate, the tolls thereby made payable shall be paid for repassing," &c. The above toll of 1s. was afterwards reduced to 9d. On the road from Whitechapel to Ongar there are three toll-gates; Whitechapel gate, Stratford gate, and Woodford Bridge gate. In July, 1828, the defendant, who is a stage-coach proprietor, paid the toll of 9d. at the Woodford Bridge gate, and afterwards, and before the coach arrived at the Whitechapel gate, changed horses. Upon a toll of 9d. being there demanded, he produced the ticket given him at the Woodford Bridge gate, and contended that, notwithstanding the change of horses, he was exempt from paying at the Whitechapel gate. The question for the opinion of this Court was, whether or not the defendant was liable to pay the toll when his coach passed through the Whitechapel gate, the horses having been changed before they reached that gate?

**F. Kelly* for the plaintiff. The defendant, having paid toll at Woodford Bridge gate, and having changed horses afterwards, was liable to [*918 pay an additional toll at the Whitechapel gate in respect of the same carriage drawn by *different horses*. Here, by section 19, the toll is imposed on the horses or other beasts of draught drawing any carriage. If the case had stood upon this section alone, the plaintiffs might have demanded an additional toll, in respect of the carriage and horses; but section 20 provides, that no person shall be liable to pay toll more than once in the same day, for passing with the same horses or carriages through all or any of the toll-gates; but that all persons having paid toll, and producing a ticket, shall afterwards pass with the same horses and carriages toll free through all the gates. It will be said that a party is exempted from toll who passes with "*the same horses or the same carriage*;" but taking the whole of section 20 together, that is by no means clear; for though in the early part of that section, which merely declares that no person shall be liable to pay toll more than once in the same day, the words "*horses or carriages*" are used; yet, in the latter part, which exempts persons having paid toll once from the payment of a second toll, the words are "*horses and carriages*." The exempting part of the clause, therefore, only applies to persons passing with the same horses as those in respect of which the former toll was paid. Here the toll is demanded, not for passing with the *same carriage*, but for passing with *different horses*. He cited *Loaring v. Stone*, 2 B. & C. 515, and *Jackson v. Curwen*, 5 B. and C. 31.

**R. V. Richards, contrd.* The question turns upon the meaning of [*919 the exempting clause, and if there be any ambiguity in the act, the construction must be in favour of the public. *Chambers v. Williams*, 5 B. & C. 36, n., *Stourbridge Canal Company v. Wheeley*, ante, 792. It is true that, here, the toll is imposed on the horses, but then, by the exempting clause, no person is to pay toll more than once in the same day, for passing or repassing with the *same horses or carriages* through any of the toll gates. The defendant, therefore, having paid toll at the Woodford Bridge gate, was not liable to pay a second toll for passing the Whitechapel gate with the *same carriage*, though with *different horses*. In *Norris v. Poate*, 3 Bingh. 41, the toll was imposed on the horses drawing any coach; and by the exempting clause it was enacted, that if any

person should have paid the toll for passing, the same person, upon producing a ticket, should be permitted to repass free with the same cattle *or* carriage; and it was held, that the toll having been paid by the coachman on passing, *or* horses drawing a stage-coach, a second toll could not be demanded for the same horses repassing, though with a different coach belonging to the same proprietor, and a different coachman; and Park, J., there observed, that the judgment in *Loaring v. Stone*, 2 B. & C. 515, turned on the conjunctive “and” in the exempting clause of the act. Here the same person returned with the same carriage. In *Jackson v. Curwen*, 5 B. & C. 31, the toll was imposed on the horses drawing a carriage; but it was provided that no more than one toll
 *920] *or* other cattle passing once and repassing once in the same day; and it was held, that the second toll was not payable for the same horses passing once and repassing once in the same day, drawing a different carriage belonging to the same proprietor.

LORD TENTERDEN, C. J. There are two modes of imposing toll in acts of parliament. In some, they are imposed on the carriage; in others, on the horses drawing the carriage. Of late years, the latter is the more usual course, it being more favourable to those who manage the road. Here the toll is imposed on the horses drawing the carriage. If the question had been, whether a second toll would be payable in respect of the same horses drawing a different carriage, the arguments urged on the part of the defendant would have considerable weight, because the question would then turn entirely on the twentieth section, which is ambiguous; but we are not called upon to decide that. Here, the only question is, whether a second toll is payable in respect of different horses? It seems to me that, as the toll is imposed expressly on the horses, a second toll is payable on the same day in respect of different horses drawing the same carriage. By the nineteenth section a toll would be clearly payable at every turnpike gate for every three or four horses drawing any carriage. A second toll would, by this section, have become payable at the Whitechapel gate. But it is said, that the defendant, having paid a toll at the Woodford Bridge gate, is, by the twentieth section, exempted from the payment of a second toll at the Whitechapel gate, though he passed through that gate with different horses, because he passed
 *921] with the same carriage. The language of that *section* is very ambiguous, and the meaning of it much too doubtful to prevail against the plain meaning of the clause imposing the toll. The judgment of the Court must, therefore, be for the plaintiff.

PARKE, J. Some little doubt is created in this case by the twentieth section. In construing the act, the true point to look at is the subject-matter on which the toll is imposed, which in this case is the horses. The different parts of the twentieth section are inconsistent with each other; and, taken as a whole, it is without any definite meaning. The safer course, therefore, is to look to the plain meaning of the clause imposing the toll; and according to that, a toll was demandable at the Whitechapel turnpike gate in respect of different horses, though drawing the same carriage.

TAUNTON, J. According to the plain meaning of the clause imposing the toll, the duty becomes payable at every toll-gate in respect of the horses drawing. The only doubt arises from the unfortunate use of the word “*or*” in the early part of the twentieth section. In the latter part of that section the word “*and*” is used, which imports that the horses as well as carriage must be the same to come within the exemption; and I cannot help thinking that the word “*or*,” in the early part of the section, was introduced by mistake. Upon the whole, my opinion is, that the exemption from toll does not apply unless the same horses draw the same carriage.

PATTESON, J. I think, in order to claim this exemption, it is necessary, at all events, that there should be the same horses. The difficulty arises from the
 *922] use of *the* word “*or*” in the early part of the exempting clause. If it had been used in both parts of the section I should have entertained some

doubt; but as the word "and" is used in the latter part, I think the legislature intended that an additional toll should be paid for different horses. The judgment must be for the plaintiff. Judgment for plaintiff.

DOE dem. The Right Hon. Sir N. C. TINDAL v. ROE. Nov. 15.

A tenant who has surrendered his term, but refuses to quit the premises, cannot, on ejectment brought by the landlord, be compelled to enter into the recognisance prescribed by 1 G. 4, c. 87, s. 1, in cases where the term or interest has *expired, or been determined by notice to quit*.

CAMPBELL had obtained a rule calling upon Amory Pratt, the tenant in possession, to show cause why, in addition to the common rule and undertaking, he should not, in case of a verdict for the plaintiff, give judgment of the term next before the trial; and why he should not enter into a recognisance, by himself and sureties, to pay the costs and damages which should be recovered by the plaintiff, according to the statute 1 G. 4, c. 87, s. 1. Pratt, the tenant, had held a farm, which was the subject of this action, under a lease from the lessor of the plaintiff, for a term which had not elapsed at the time of the present application. Being indebted to the lessor of the plaintiff for a large amount of rent, and being insolvent, he assigned the farm and all his other effects, for the benefit of his creditors, to certain parties, in trust, among other things, to surrender the lease, if they should so think fit. They entered into possession, and managed the farm; but allowed Pratt and his family to continue in the dwelling-house. The trustees ultimately surrendered the lease by deed to the lessor of the plaintiff, who then required Pratt (in writing) to give up *possession. He refused, and was thereupon served with a declaration in ejectment, and the notice directed by the statute, to appear in court and give bail. [923]

Barstow now showed cause. The tenant is not compellable to enter into recognisance. The statute provides for two cases;—where the term or interest of any tenant holding for a term or number of years certain, or from year to year, "*shall have expired, or been determined either by the landlord or tenant by regular notice to quit.*" Here neither event has taken place. An act calling upon a tenant to give security before he is admitted to defend his possession ought to be construed strictly. The statute says, that on production of the lease, and affidavit made of the due execution, and that the interest has expired or been determined by notice to quit, the landlord may move as has been done here. If it had been meant to include the case of a surrender, the statute would probably have required a production of the instrument by which the surrender was made. In *Doe dem. Pemberton v. Roe*, 7 B. & C. 2, this court refused a rule for a recognisance where the holding was not strictly of the description specified by the act. *Doe dem. Cardigan v. Roe*, 1 Dowl. & Ry. 540, is nearly in point. There the tenant had given a notice of his intention to quit at a time earlier than the regular expiration of the lease: the landlord accepted it: but the tenant would not quit at the time; and on ejectment brought and motion made, as in the present case, this Court held that the statute did not apply.

Campbell, contra. This is a case clearly within the mischief of the act; for the grievance there recited *(sect 1), is the unlawful holding over by tenants "after the expiration or legal determination of their terms or interests." The interest here, if it had not expired, had been determined. In *Doe dem. Cardigan v. Roe* the term in the lease had not expired, and the Court may not have thought that the tenant's interest was "determined by regular notice to quit," within the meaning of the statute. But here the tenant is only in possession by a mere contumacious holding over. [924]

LORD TENTERDEN, C. J. This Court has already put its construction on the

clause in question in *Doe dem. Cardigan v. Roe*, and I am not prepared to say that that construction was wrong.

PARKE, J. The present case must be decided by *Doe dem. Cardigan v. Roe*; though, if this were *res integra*, I should perhaps think that such a construction ought not to prevail, for it seems to me calculated to defeat the real object of the statute.

TAUNTON, J. I think the statute applies only to cases where the term has come to a natural end, or been extinguished by a regular notice to quit. I see no reason to find fault with the decision which has been referred to.

PATTESON, J. I think we must adhere to the decision in *Doe dem. Cardigan v. Roe*. The rule must therefore be discharged.

Rule discharged, without costs. (a)

(a) See the observations of the Court on this statute, in *Doe dem. Phillips v. Roe*, 5 B. & A. 766.

*925] *JOHNSON v. DURANT and Another. Nov. 18.

An order of reference was made in an action where the main point in dispute was, whether certain goods, the value of which (namely 246*l.*) the defendants proposed to set off against the plaintiff's claim, had been bought by the plaintiff of the defendants, or of A. B. The question stated in the order was, whether or not the defendants were entitled to set off the sum of 246*l.* The arbitrators (as was alleged) being unable to decide the main point, but finding that, at all events, a small deduction (8*l.* 12*s.*) was to be made from the 246*l.*, awarded, in the terms of the order of reference, that the defendant *was not entitled to set off 246l.* A rule was afterwards obtained for setting aside the award as not being final, but discharged. The plaintiff then brought an action of debt on the award; and the defendants pleaded a set-off to the amount of 237*l.* 10*s.* 6*d.*:

Held, that they could not now set off the difference between the 246*l.* and 8*l.* 12*s.*, for that the award was conclusive as to the sum now sought to be set off, as well as that mentioned in the order of reference; and if the arbitrators had gone upon a mistaken ground, their decision could not be questioned in this form.

DEBT on an award. The declaration stated that a cause was depending between the plaintiff and the defendants in the King's Bench, and a certain question having arisen between them, whether the plaintiff was entitled to recover, as against the defendants, the sum of 246*l.* 3*s.*, part proceeds of a certain bill of exchange for 292*l.* 10*s.*, in question in that cause; and also, whether, against such amount, the defendants were entitled to a set-off of the like sum of 246*l.* 3*s.* for a bale of silk, it was ordered by Lord Tenterden, that that question should be referred to the arbitration of P. E., B. C., and J. G., who afterwards awarded and determined that the plaintiff was entitled to recover against the defendants the said sum of 246*l.* 3*s.*, part proceeds of the bill of exchange in the said order mentioned, and that against such amount the defendants were not entitled to set off the like sum of 246*l.* 3*s.* for a bale of silk. The declaration then stated, that the plaintiff had demanded this sum of 246*l.* 3*s.*, but the defendants had not paid it. To this were added the usual money counts. The defendants pleaded to the first and fourth counts (the latter being for interest), a set-off for goods sold and delivered, and money had and received, and due and owing; and to the other
*926] counts, nil debent: and they paid *8*l.* 12*s.* 6*d.* into court. In his replication the plaintiff denied the set-off.

At the trial before Lord Tenterden, C. J., at the sittings after last Michaelmas term, in London, the plaintiff proved the execution of the award. It was then proposed, on the part of the defendants, to show that the plaintiff was indebted to them in a sum of money less than 246*l.* 3*s.* for a bale of silk. It was admitted that the question as to the right of the defendants to set off in respect of that bale of silk had been considered by the arbitrators, but it was contended, that they had only adjudicated that the defendants were not entitled to set off the precise sum of 246*l.* 3*s.*, but had not determined whether the plaintiff was not liable to some

extent. Lord Tenterden, however, held that this evidence was not admissible,^(a) and the plaintiff obtained a verdict. In the ensuing term, a rule was obtained for a new trial on the ground that the defendant ought not to have been precluded from giving evidence of the set-off, and also upon affidavits which were met by others on the part of the plaintiff. From the whole of these it appeared that the point in dispute was as to a bale of silk which the defendants alleged they had sold to the plaintiff through the agency of Fellowes and Bury, but which, according to the plaintiff, had been sold by the defendants to Fellowes and Bury as principals. The price of this bale would have been 246*l.* 3*s.*, but a deduction of 8*l.* 12*s.* 6*d.* had been made soon after the sale, on account of short measure, and accordingly only 237*l.* 10*s.* 6*d.* could be due. It was alleged in the affidavits that the arbitrators not being able to agree in a decision upon the actual question between the parties, had formed their award in **the precise terms* of the order of reference, thus finding merely that the particular sum there named was not to be set off; and therefore the defendants contended that the award was not final. On the other hand, it appeared that the defendants had applied to the Court to set aside the award on this ground, and had obtained a rule nisi, in which the above objections to the award were specifically stated, and which was afterwards discharged with costs. The affidavits were in some respect contradictory as to the reasons which induced the arbitrators to make this award; but it was shown that evidence had been given before them of the whole transaction relative to the sale of the silk. [*927]

Campbell (with whom was *Talfourd*) now showed cause. This question has been fully settled by the arbitrators, for they have made their award in the language of the submission, which they have properly interpreted. It is clear they have considered the general point in dispute, otherwise the rule for setting aside the award would not have been discharged with costs. (Here he was stopped by the Court.)

Sir *James Scarlett*, *F. Pollock*, and *S. Martin*, in support of the rule. Although the Court generally hold the award of arbitrators to be binding, yet they will not allow their rules to work injustice, which would be the case if the defendants were to be concluded by this award. There is a peculiarity in the order of reference, for it mentions a precise sum as that claimed in the set-off; but it is clear that the parties never could have intended to bind themselves to that sum. It must have been understood that the arbitrators were not to be **controlled*. They themselves ought to have considered the fixing the precise sum as a mere error in drawing up the order, and to have determined the merits of the case; instead of which they have considered themselves bound down by the language of the order, and have thus proceeded on a mistaken ground. They have not determined the question really intended to be referred to them, the merits of which were entirely with the defendants. [*928]

Cur. adv. vult.

LORD TENTERDEN, C. J., now delivered the judgment of the Court.

This was an action of debt upon an award; to which the defendants pleaded a set-off, and by their particular claimed to set off the sum of 246*l.* 3*s.* in respect of a bale of silk alleged to have been sold by them to the plaintiff. They also paid a sum of 8*l.* 12*s.* 6*d.* into Court. The reference was by a judge's order made by consent of the parties in a former action between them. At the trial it was proposed on behalf of the defendants to prove that the sum of 8*l.* 12*s.* 6*d.* was, by consent of the defendants, soon after the sale, allowed as a deduction from the price in respect of short measure or other deficiency; and that the arbitrators had considered themselves bound down to the precise sum of 246*l.* 3*s.*, and had made their award for that reason only, and had forbore to decide the real question between the parties, which was, whether the bale had been sold and credited by the defendants to the plaintiff, or by them to Fellowes and Bury, brokers, and by the latter to the plaintiff. A rule of this Court for setting aside the award had been obtained and discharged with costs before the

(a) See the reasons fully stated in the judgment.

*929] present *action. It is obvious, by the terms of the reference, both parties considered the sum of 246*l.* 3*s.* as the agreed price of the bale. At the trial it appeared to me, that the arbitrators had put a right construction upon the reference as limiting their award to that sum; but then, as the parties had agreed upon the sum, I thought the question as to the sale was properly the matter for decision by the arbitrators, and that in the present proceeding they must be taken to have decided that question, and I refused any evidence to show the contrary.

The application for a new trial was for this supposed misdirection; and upon affidavits made for the purpose of showing that the arbitrators had thought themselves bound, and that if they had not so thought their decision would have been in favour of the defendants, and that upon the merits of that question it ought to be so. And it was very strenuously urged that some way ought to be found to remedy the injustice that would take place, if the defendants were bound by this award.

I should be very sorry to find that in any case the general rules and principles of law had worked injustice in the particular instance. But in the infirmity of all human jurisprudence such events must occasionally happen; and the evil is of less magnitude than the total absence of general judicial rules, or a departure from them to meet the supposed hardship of a particular case.

Affidavits were also laid before the Court on behalf of the defendants; and upon consideration of those on one side and the other, it is by no means clear *930] that the bale was not really sold by the defendants to *Fellowes and Bury as the plaintiffs contended; and it is quite clear that evidence on that question was laid before the arbitrators. And the utmost that can be inferred from the affidavits will be, that probably the arbitrators, finding the decision of that question attended with difficulty, relieved themselves from the difficulty by deciding upon the narrow ground as to the particular sum: or, in other words, which is the strongest way of viewing the case in favour of the defendants, that they made their award on a mistaken ground.

Now, if an award made in pursuance of a judge's order drawn up by consent of parties, proceeds on a mistaken ground, the proper course of relief is an application to the Court to set aside the award. Such an application was made in this case, and failed; and one object of the affidavits is to invite the Court to rehear that matter, in effect, though, perhaps, not in form. But such a rehearing upon fresh affidavits is contrary to all practice, and to the maxim, *Interest reipublicæ ut finis sit litium*. And this brings the case to the question, whether the award was conclusive, or the proposed evidence ought to have been received at the trial. And it was contended that, assuming the award to be conclusive as to the particular sum mentioned therein, and in the order of reference, it was not conclusive as to the smaller and different sum now sought to be set off. But it must be remembered that the particular sum was the price agreed upon by the parties. And the question, as it regards the smaller sum, is precisely the same as upon the particular sum agreed. So that the real question is, *931] whether, after reference and award, the defendants can, in *an action of debt upon the award, be allowed to impeach and annul it upon the ground that the decision of the arbitrators proceeded upon a mistake.

No authority was cited in support of such a proposition, and I am not aware that any can be found. Surely, if it can be done at all, it must be done by some proper plea to the declaration on the award. In the present case there was no such plea: not only was there no plea that the award was founded upon mistake or misconduct, but not even a plea of the general issue denying the debt claimed on the award. The only plea was a set-off: and the endeavour was to show under such a plea that the sum awarded was not due from the defendants, but only the small sum of 8*l.* 12*s.* 6*d.*, which had been paid into Court. We think this could not be done, and consequently that the rule must be discharged.

Rule discharged.

***BRANDT and Another v. BOWLBY and Another.(a)** [*932]

B., a merchant in England, in June and July 1830, sent orders for the purchase of corn to the plaintiffs, in Russia, desiring them to draw upon H. and Co., in London, for the amount, and he chartered a ship belonging to the defendants, and sent it to Russia to be freighted. On the 28th of July B. wrote a letter, cancelling the orders he had given. Upon the 8th of August, 1830, the plaintiffs informed B. that they had purchased a cargo for the ship, and should despatch it as soon as possible, addressed to H. and Co., London, expressing a hope that he would approve of what they had done, notwithstanding his last-mentioned communication. The cargo was afterwards shipped, and the plaintiffs by letter informed B. that they had shipped it on his account, and that they had forwarded an *endorsed* bill of lading to H. and Co., drawing upon them for part of the price, and upon him (B.) for the residue; and they enclosed an *unendorsed* bill of lading to B. and an invoice of the wheat, in which it was stated to be bought for his order and on his account. The bills of exchange enclosed in this letter were dishonoured, whereupon the plaintiff's agent in London delivered the endorsed bill of lading to H. and Co. On the 2d of October B. confirmed the revocation of his order, and on the 24th of November the agent of the plaintiffs in England gave notice to the agent of B. that he should retain the whole of the wheat for the plaintiffs. B. afterwards became desirous of having the wheat, and the master of the vessel in which the wheat was shipped, delivered it to B.'s orders, and not to H. and Co., pursuant to the bill of lading.

In an action brought against the ship-owners for not delivering pursuant to the plaintiffs' orders, it was contended, that the plaintiffs were entitled to recover nominal damages only, because the property in the wheat had actually vested in B. by the shipment: Held, however, that the property did not vest in B. absolutely upon the shipment, but only subject to a condition, that the bills were accepted, and that in default of acceptance, it never did vest in him; and, consequently, that the plaintiffs were entitled to recover the value of the wheat at the time when it was delivered to B.'s order.

ASSUMPSIT against the defendants, as owners of the ship *Helena*, for not delivering to the plaintiffs' orders or assigns at London a cargo of wheat shipped by them. At the trial before Lord Tenterden, C. J., at the London sittings after last Trinity term, the following appeared to be the facts of the case:—The plaintiffs were merchants, having establishments at St. Petersburg and Archangel, and Emanuel H. Brandt, brother of one of the plaintiffs, was their agent residing in London. Mr. Berkeley, a commission merchant, who lived at Newcastle-upon-Tyne, being desirous of making some purchases in corn, sent, in June and July 1830, to the plaintiffs (through Emanuel H. *Brant) [*933] several orders for the purchase of corn on his account, directing them to draw upon Esdaile and Co., bankers in London, for the amount, and also upon Harris and Co., in London, to a certain extent. Berkeley chartered four ships, and, among the rest, the *Helena*, belonging to the defendants, and sent them to Russia to be freighted by the plaintiffs. A dispute arose between Berkeley and E. H. Brandt, and the former sent a letter on the 28th of July, cancelling every order he had given. That letter was forwarded to St. Petersburg by E. H. Brandt. Various shipments were made by the houses in Russia on account of Berkeley, and were transmitted to England in the vessels chartered by him. Bills were drawn upon Esdaile and Co. for the amount, but on their arrival they were dishonoured, and the cargoes were refused. The question in this case arose as to a cargo shipped by the *Helena*. By a letter dated August 8th, 1830, to Berkeley, the plaintiffs wrote as follows:—"We have succeeded in purchasing a cargo of wheat for the *Helena*, and shall despatch it as soon as possible to the address of R. Harris and Sons, London, which house we shall address to-day with regard to effecting the insurance. We trust what we have done for you will meet your approval, although by a communication received from Mr. E. H. Brandt subsequently to our having made this purchase we learn that you have been induced to cancel the several orders in our hands." This cargo was afterwards shipped in the *Helena* for England, and the plaintiffs wrote the following letter to Berkeley:—"St. Petersburg, August 26, 1830. We now have much pleasure in waiting upon you with invoice and bill of lading of 770 chests wheat shipped *for your account and risk* per the *Helena*, Mann. For *the amount of the former, if found correct, you will please give us credit [*934] with 810*l.* 4*s.* 5*d.* An endorsed bill of lading we have this day forwarded

(a) This case was moved on Monday, November the 7th, but was unavoidably omitted in its proper place.

to Messrs. R. Harris and Sons of London, at the same time drawing upon them for 673*l.* 15*s.*; and for the balance remaining thus in our favour, viz. 136*l.* 9*s.* 5*d.*, we this day make free to value upon you at three months' date, payable in London to the order of Emanuel H. Brandt, which draft we beg to recommend to your kind protection." An unendorsed bill of lading was enclosed, and an invoice of "wheat bought by order and for account of J. Berkeley, Esq., Newcastle, and shipped at his risk to London, to the address of R. Harris and Sons there, per the *Helena*, Captain James Mann." The bills of exchange enclosed in this letter drawn upon Berkeley and Harris and Co. were presented for acceptance and refused. Whereupon E. H. Brandt delivered the endorsed bill of lading to Harris and Co. and desired them to accept the bill of exchange drawn upon them on his account, and to effect an insurance upon the cargo, which they were to receive on his arrival. In a letter dated September 29, 1830, from E. H. Brandt to Mr. Hedley (who acted as an agent for Berkeley), he wrote, "Mr. Berkeley refuses to receive the cargoes or give any instructions for the acceptance of the bills, and I have been obliged for the security of the property to insure the cargoes, and give the captain orders where to proceed to, though of course I still hold Mr. Berkeley answerable for the consequences of his behaviour."—"I conceive that you are bound to see that his engagements are fulfilled, and I call on you to see Mr. B. immediately and make arrangements for the acceptance of all the bills without delay." On the 2d of October, Berkeley confirmed the *935] revocation of his *orders, and on the 24th of November, E. H. Brandt gave notice to Hedley that he should retain the whole of the wheat for his brother. After which Berkeley offered to pay the price of the wheat and the charges, but it was refused. The captain delivered the cargo of the *Helena* to Berkeley's orders at Grangemouth, and not to Harris and Co. in London according to the bill of lading. Upon proof of these facts, the Lord Chief Justice directed the jury to find a verdict for the plaintiffs, and to assess the damages at the price of the cargo when it reached the port of discharge.

Campbell, for the defendants, moved for a new trial, on the ground of misdirection, or to reduce the amount of damages. The ship-owners, who have delivered over the cargo of the *Helena* to Berkeley, if answerable at all to the plaintiffs, are only so in nominal damages. Berkeley had sent out orders to Brandt and Co., the defendants, to which they had assented, and thereby a contract was established between them. Afterwards Berkeley sent to cancel all his orders; but he could not of himself rescind the contract, Brandt and Co. must also have assented to such cancelling. But they did not so assent after they had received the letter of cancellation; they despatched the cargo by the *Helena*, with an invoice stating it to have been bought for his account and shipped at his risk. On that shipment, then, the property vested in him. [Lord TENTERDEN, C. J. He had refused to receive it before that.] But he was afterwards willing to receive it, and offered to pay the invoice price, and all the charges due upon the cargo. It is clear that trover could not have been maintained against Berkeley *936] for the wheat if he had got possession of it, *Coxe v. *Harden*, 4 East, 211. There goods were purchased abroad and shipped on account and at the risk of the consignee, and bills of lading were taken from the captain to deliver them to the consignor's own order. One of them was transmitted unendorsed, together with an invoice, to the consignee, enclosed in a letter, informing him that the consignor had drawn upon him for the amount, and an endorsed bill of lading was sent to the consignor's agent. It was held that on the shipment, the property in the goods vested in the consignee. That case is quite analogous to the present, and proves that the wheat could not have been recovered from Berkeley. [PARKE, J. In the present case the letter enclosing the bill of lading informed the consignee that an endorsed bill of lading had been sent to another person. That was not so in the case cited.] But supposing the Court to be of a contrary opinion, then the proper measure of damages was the invoice price of the wheat and the charges, not the value at the port of discharge. The amount of the damages ought therefore to be reduced.

LORD TENTERDEN, C. J. There ought to be no rule in this case. It is an action against the defendants as ship-owners, on the bill of lading, by the terms of which the captain undertakes to deliver certain goods shipped for London, at London, to the plaintiffs' orders. The complaint against the defendants is, that instead of delivering them to the plaintiffs' orders, they delivered them at another place, and to a person who had not the plaintiffs' orders. This was a breach of the contract for which the plaintiffs might undoubtedly *maintain an action against the ship-owners. But they defend themselves under [*937 Berkeley, and say that he had a right to receive the goods, for the property had vested in him, and therefore the plaintiffs are not entitled to more than nominal damages. Let us see how that is. The wheat had been purchased on his order, which he revoked. By the original terms of the contract it was to be sent to London, and bills were to be drawn upon Harris and Co. for the amount. Berkeley, however, insisted he would have nothing to do with it. Emanuel H. Brandt insisted he should, and that he would hold him to his engagement. The plaintiffs send the letter of the 26th of August stating that they have shipped the wheat on his account. At the same time they inform him that they have forwarded an endorsed bill of lading to Harris and Co., and have drawn upon him and them for the amount. He directed them not to accept the bills drawn on them, and they were not accepted. Can it be said that he has performed his part of the contract, which was not only to receive the goods, but also that Harris and Co. should accept bills for payment of the value? He could have no right to the goods unless he allowed Harris and Co. to accept the bills; for that was a part of the bargain. After the refusal to accept, E. H. Brandt effected an insurance on the goods for the use of the plaintiffs. It is impossible, therefore, to say that the property had vested in Berkeley; and the defendants were not justified in delivering the wheat to him. The damages ought to be the value of the cargo at the time when it was to have been delivered, that is, at the port of discharge.

PARKE, J. I am of the same opinion. This is an action on the bill of lading for not delivering to the *assignee of the plaintiffs. The defendants have not done that, but have delivered to a third party. In order to defend [*938 themselves, they must establish the right of that third party, but in that they have failed. It appears that Berkeley gave orders to the plaintiffs to purchase wheat on his account, and that they consented to execute those orders. Berkeley, however, took upon himself, in his letter of the 28th of July, to cancel his orders. Now, I agree to the law laid down in argument, that a contract cannot be rescinded by one only of two contracting parties; but the question in this case is, whether the property in the goods shipped ever vested in Berkeley at all. That depends entirely on the intention of the consignors. It is said that the plaintiffs, by the very act of shipping the wheat in pursuance of Berkeley's order, irrevocably appropriated the property in it to him. I think that is not the effect of their conduct: for, looking to the letter of the 26th of August, it manifestly appears that they intended that the property should not vest in Berkeley unless the bills were accepted. They stated in that letter that they had drawn upon Harris and Sons and Berkeley, bills amounting to 810*l.*, the price of the wheat, payable to E. H. Brandt; and they recommended them to his, Berkeley's, protection. They also stated that they had forwarded to Harris and Sons an *endorsed* bill of lading, and they enclosed to Berkeley an unendorsed bill of lading. The fact of their transmitting the latter bill of lading to Berkeley, and an endorsed one to Harris and Sons, shows clearly that they did not intend that the profits in the wheat should vest absolutely in Berkeley, but should be subject to a condition that the bills were accepted. As they were not accepted, Berkeley has not performed the condition on which the vesting of the [*939 *property in him was to depend, and therefore it never did vest in him. The only remaining question is as to the amount of the damages. As between the parties in this cause, the plaintiffs are entitled to be put in the same situation as they would have been in if the cargo had been delivered to their order at the

time when it was delivered to Berkeley; and the sum it would have fetched at that time, is the amount of the loss sustained by the non-performance of the defendants' contract.

TAUNTON, J. The bills drawn by the plaintiffs in payment of this cargo not having been accepted, no property vested in Berkeley. It cannot be said that by the letter of the 29th of September, E. H. Brandt set up again the contract which had been rescinded. That letter is not a waiver of the breach of the contract, but a remonstrance on its non-completion and the non-acceptance of the bills. He does not say, we shall hold Berkeley to his original contract, but that he will be held answerable for the consequences of his behaviour. That must mean for any damage which may accrue from his not performing the contract. As to the amount of damages, I think the value of the wheat on its arrival at the port of discharge where it was delivered to Berkeley, is the amount of the loss sustained by the defendants' breach of contract.

PATTESON, J. I am of the same opinion. In *Coxe v. Harden*, 4 East, 211, trover was brought by the endorsee of a bill of lading to recover the value of goods, the possession of which had been obtained by the assignee of the party *940] on whose account they were shipped; and although *the decision in that case was, that the action was not maintainable, Lord Ellenborough, C. J., and Le Blanc, J., seem to intimate that an action might have been maintainable by the consignors against the captain. The present action is by the shipper against the owners for not delivering according to the bill of lading. I think such an action is maintainable; and that being so, the only question is, what damages are recoverable? *Prima facie* the plaintiffs are entitled to recover the sum which the cargo would have brought when it ought to have been delivered to the plaintiffs' assignee. It has been said that the property absolutely vested in Berkeley by the shipment, and, if so, that the plaintiffs are entitled to recover nominal damages only; but it seems to me that the bills drawn for the cargo not having been accepted, Berkeley had not performed his part of the contract, and therefore the property did not vest in him, and consequently that the plaintiffs were entitled to recover the full value. Rule refused.

BROADBENT v. SHAW and Others.(a)

Trespass for breaking and entering the plaintiff's close, &c. Plea, first, not guilty; secondly, a right of way. Replication joined issue on plea of not guilty, traversed the right of way, and new assigned. The defendants joined issue on the right of way, and suffered judgment by default as to the new assignment. The jury having found a verdict for the defendants on the special plea, and assessed the damages at 1s. on the new assignment: Held, that the defendants, not having withdrawn the general issue, were not entitled to the general costs of the trial.

TRESPASS for breaking and entering the plaintiff's close, and treading down the corn, grass, &c. The defendants pleaded to the whole declaration: first, *941] *not guilty; secondly, a right of way. The plaintiff, in his replication, took issue on the plea of not guilty, traversed the right of way, and new assigned, that the defendants committed the trespasses on other occasions than those in the second plea mentioned, and for other and different purposes, and in other and different parts of the closes out of the said supposed way. The defendants joined issue on the traverse as to the right of way, and suffered judgment by default as to the trespasses newly assigned. At the trial, the jury found for the plaintiff on the general issue, and for the defendants on the issue as to the right of way; and they assessed the damages, on the new assignment, at 1s. The Master, on taxation, allowed the plaintiff 20l. only for the costs of the new assignment, and the general costs to the defendants.

(a) This case was argued on Thursday, November the 17th, in the absence of Lord TENTERDEN. It was unavoidably omitted in its proper place.

Addison had obtained a rule nisi for the Master to review his taxation, on the ground that the general issue being pleaded to the whole declaration, and that plea not having been withdrawn, the plaintiff was forced to go to trial in order to obtain damages upon the judgment by default on the new assignment, and was therefore entitled to the general costs in the cause; to which point he cited *House v. The Thames Commissioners*, 3 Brod. & B. 117, *Longden v. Bourne*, 1 B. & C. 278, and *Vickers v. Gallimore*, 5 Bingh. 196; and he observed, that a new assignment did not introduce new trespasses, but only described, with greater particularity, those mentioned in the declaration, and was an explanation of that, showing that the defendants in their plea had mistaken the plaintiff's meaning. The introduction, by a new assignment, of trespasses different from those in the declaration, would be a departure. *Then the trespasses in the declaration and in the new assignment being the same, a general denial of all the trespasses in the declaration was inconsistent with a judgment by default on the new assignment. That judgment consequently could never be available as long as the general issue remained on the record. The plaintiff in this case was, therefore, obliged to go to trial to prove so much of the declaration as comprehended the trespasses newly assigned. In *Cross v. Johnson*, 9 B. & C. 613, there was a retraxit as to so much of the general issue as related to the trespasses newly assigned. [*942]

Blackburne now showed cause. The defendants having succeeded on the justification, which embraced the whole cause of action, are entitled to the general costs of the cause; for it is a rule, that where one plea goes to the whole cause of action, and is found in favour of the defendant, he is entitled to general costs. *Vivian v. Blake*, 11 East, 263; *Benett v. Coster*, 1 Brod. & Bingh. 465; *Othir v. Calvert*, 1 Bingh. 275; *Edwards v. Bethel*, 1 B. & A. 254. The suffering of judgment by default as to the trespasses newly assigned, and thereby admitting that as to them the defendants were wrong, operates as a virtual withdrawing of the general issue, inasmuch as the trespasses newly assigned are included in the declaration. It cannot be necessary to make a special entry on the record that it has been so withdrawn. In *Booth v. Ibbottson*, 1 Young & Jervis, 354, the justification was pleaded as to part only of the trespasses, and the issues as to these were found for the defendant; but the plaintiff, having established her right on the whole record, *was held to be entitled to the general costs; there, however, *Hullock, B.*, observed, "If the special plea had covered all the trespasses, the defendants would have been entitled to their full costs." Here the special plea does apply to all the trespasses. [*943]

PARKE, J. The point raised in this case I consider fully settled by the three cases of *House v. The Thames Commissioners*, 3 Brod. & Bingh. 117, *Longden v. Bourne*, 1 B. & C. 278, and *Vickers v. Gallimore*, 5 Bingh. 196. Since those decisions, the usual practice has been, in cases like the present, to withdraw the general issue. The rule having been established by those decisions, I think we must abide by it.

TAUNTON, J. The ancient course of practice seems to me to have been more reasonable and intelligible than that now in use. Before the case of *House v. The Thames Commissioners*, it was considered that suffering judgment by default to the trespasses newly assigned was a virtual withdrawing of the general issue, because the defendant, by suffering judgment by default, confessed that he was guilty of the trespasses newly assigned, and those were the trespasses mentioned in the declaration. But it is now said, that, by the defendants' allowing the general issue to remain on the record, the plaintiff is compelled to prove the trespasses in the declaration. That seems to me contrary to reason; but it having been so decided in three cases, and the course of practice having been established accordingly (as stated in the last edit. of *Saunders*, vol. i. 300 a, a note (f),) I think we are bound to hold that the plaintiff is entitled to the general costs.

***PATTESON, J.** I feel myself bound by the decisions which have taken place upon the subject, though I cannot say I think they are founded in good sense. [*944]

Rule absolute.

The KING v. The Justices of NORFOLK. Nov. 21.

An appeal was entered and respited, entitled, "A. B. appellant, and the churchwardens and overseers of B. respondents;" and was stated to be against the allowance of the overseers' accounts. Notice of the appeal, addressed to the overseers only, was afterwards served upon them, but no notice was given to the churchwardens, who, in fact, had not received or disbursed any money, or kept any account:

Held, that the difference between the entry of appeal and the notice was immaterial; and that the churchwardens, having had no account to keep, were not entitled to notice as joint officers with the overseers.

At the quarter sessions for Norfolk, in April 1831, an appeal was entered in the following form:—

William Rogers, - - Appellant	{	Accounts and disbursements of the overseers, allowed 28th of March, 1831.
And		
The Churchwardens and Overseers of Brancaster - Respondents.		

The appeal was respited till the following sessions, before which the appellant caused a notice of the said appeal to be served on the overseers for the year ending March 1831, addressed to "J. A. and T. S., now or late the overseers," &c., but not to the churchwardens, and no notice was given to them. The sessions refused to hear the appeal, because the notice varied from the entry of appeal, and because the churchwardens had had no notice. A rule was afterwards obtained, calling upon the justices to show cause why a mandamus should not issue, directing them to enter continuances and hear the appeal. The affidavits in support of the rule stated, that J. A. and T. S. were the overseers for the above-mentioned year, and were the only parish officers who received and disbursed money during that period; and that the accounts in question were passed by them at petty sessions, and were entitled in their names only, as overseers, no mention being made of the churchwardens.

*945] *Gurney* and *B. Andrews* now showed cause. First, the entry of appeal in this case was against one set of parties, and notice for the hearing was given to another. The sessions were right in dismissing a respited appeal brought on under such circumstances. Secondly, the churchwardens ought, at all events, to have had notice, either actual or virtual. By the act 17 G. 2, c. 38, s. 1, the account of moneys raised, &c., for the poor is to be annually made by the *churchwardens and overseers*; and sect. 4, the clause upon which appeals of this nature are founded, gives the appeal to persons having "any material objection to *such account as aforesaid*." And by 41 G. 3, c. 23, s. 4, all notices of appeal against the account of the *churchwardens and overseers* must be delivered to, or left at the places of abode of the *churchwardens and overseers*, or any two of them. They form but one officer; payment to one is payment to all, and payment by one is a discharge of all; *Rex v. Bartlett*, 1 Bott, pl. 325, 6th edit., *Malkin v. Vickerstaff*, 3 B. & A. 89. [PATTESON, J. It does not follow that each is personally liable on every part of the account.] The notice of appeal ought to be addressed to all, for without that they cannot appear in court as parties to the appeal, and may be burdened by the result, without the opportunity of defending themselves. They may never even know that the appeal is instituted. It is true, the accounts passed in this case were in the name of the overseers only; but it does not follow that the churchwardens might not legally have been called upon to join in them; and they do not become the less liable by having omitted to do so. [PARKE, J. Considering them as joint officers with the overseers, I still do not agree that the church-

*946] wardens would be responsible for errors in the overseers' accounts.]

Palmer, contrà. *Rex v. The Justices of Gloucestershire*, 1 B. & Ad. 1, shows that the account of one parish officer is not to be considered, for every purpose, as the account of all; for one overseer may appeal against the other's account. The statute 43 Eliz. c. 2, s. 2, orders the churchwardens and overseers to make a true account of all sums received by them, on pain of commitment; but it

only directs (sect. 4) that *every one* so refusing to account shall be committed. The form of entry of an appeal is not to be considered with the same strictness as an indictment or conviction: it is enough if it makes known the subject-matter of the appeal. It was not necessary to prefix the names of the respondents at all, as was done in this case. (Here he was stopped by the Court.)

PARKE, J.(a) I am of opinion that this rule must be made absolute. With regard to the first objection, it is true the appeal is formally entered as an appeal against the accounts of the churchwardens and overseers of Brancaster; but it is evident to any one looking at the subject-matter of the appeal, that it was, substantially, an appeal against the accounts of the overseers; and to them notice was given. As to the second objection, it is clear, from *Rex v. The Justices of Gloucestershire*, that the accounts of joint parish officers may be treated as several, where the money transactions have been separate; and in the present case the churchwardens *had, in fact, nothing to do with the account; [*947 the overseers received all, and paid all. It would have been useless to serve a notice upon the churchwardens. There was, therefore, no valid objection to the mode in which the notice was addressed and served.

TAUNTON, J. By the statute 41 G. 3, c. 23, s. 4, it is sufficient if the notice be served on the churchwardens and overseers, or any two of them. If it had been deemed necessary that all should personally be informed of the appeal, the legislature would not have enacted that service on two only should be sufficient. The notice being addressed to all, would not make the appeal more known to those who were not served. It was held in *Rex v. The Justices of Gloucestershire*, that one overseer may appeal against the other's accounts, where they have been separately kept: of course, therefore, any other parishioner may appeal against the accounts of one or more of the overseers and churchwardens, if he or they are the only persons who have had an account to keep, and against whose account, consequently, any appeal could be instituted.

PATTESON, J. The statute 41 G. 3, c. 23, requires only that notice be served on two of the churchwardens and overseers; and therefore, it is sufficient that the notice be addressed to two. And as that which was served in the present case contained the subject-matter of the appeal previously entered, I think it was sufficient.
Rule absolute.

(a) Lord TENNENT, C. J., had gone to attend the Privy Council.

*DOE dem. GREAVES v. RABY. Nov. 24.

[*948]

At the trial of an ejectment, where there is no doubt as to the identity of the premises sought to be recovered with those for which the tenant defends, the lessor of the plaintiff is not required to produce the consent rule.

EJECTMENT tried before Littledale, J., at the Summer assizes for Nottingham, 1831. The defendant appeared at the trial by counsel, who cross-examined the plaintiff's witnesses. At the close of the plaintiff's case, the defendant's counsel required proof of lease, entry, and ouster. It was answered, that he was bound to confess them; but the defendant's counsel contended, that the plaintiff ought to produce the rule of Court, whereby the defendant had so bound himself, and cited *Doe dem. Lamble v. Lamble*, 1 M. & M. 237. The Judge, on the authority of that case, thought that the plaintiff was bound to produce the rule; which not being able to do, he was nonsuited, with leave to move to enter a verdict for the plaintiff, or for judgment against the casual ejector, in consequence of the defendant's not appearing to confess lease, entry, and ouster. *Whitehurst*, on a former day in this term, obtained leave accordingly.

Sir James Scarlett and *White* now showed cause. It was the duty of the plaintiff to produce this rule as part of his case, if he did not otherwise prove the

facts contained in it, Tidd's Practice, Supp. 189, Doe dem. Lamble v. Lamble. Without the production of the rule, the plaintiff does not identify the premises in the action with those mentioned in the consent rule. [Lord TENTERDEN, C. J. If the consent rule was required, it should have been called for at once, and not after all the plaintiff's evidence had been gone through.]

*949] **Adams*, Serjt., and *Whitehurst* in support of the rule. It was not for the plaintiff to produce the consent rule, and no purpose could be answered by calling for its production. If it is made to appear that there was no such rule, then the tenant cannot be let in to defend, and judgment must go against Richard Roe, the casual ejector. But it is part of the practice of all the courts, that no one can defend an ejectment unless he has entered into such a rule; and, therefore, the Judge at Nisi Prius must take it of his own knowledge, that such a rule has been entered into by the defendant. This is not the case of a tenant in common, where it may be necessary, under some circumstances, to produce it, Doe dem. White v. Cuff, 1 Campb. 173. The lessor of the plaintiff ought, at any rate, to have judgment against the casual ejector.

Lord TENTERDEN, C. J. The rule must be absolute for judgment against the casual ejector. I can see no advantage to be gained by the production of the consent rule. Formerly, in cases where possession of the particular premises in question was expressly admitted in the rule, it was customary to produce it as evidence of that fact, if disputed. But now to prevent a denial of justice by the party calling upon the plaintiff to prove his possession, the possession of certain specified premises is always admitted as part of the consent rule.(a) The only instance in which it can now be necessary to produce the rule, is where, the plaintiff directing his case to certain premises, the other party contends that he does not defend for those; there it may be requisite to produce the rule to show *950] for what he does *defend; but, until that dispute arises, it is a mere idle ceremony.

PARKE, J. The defendant ought to have complied with his undertaking, but has not done so. Where there is a doubt as to the identity of the premises, it may be necessary to produce the consent rule, though, in most of the late cases within my observation, the rule does not specify any particular parcels, but applies to all the premises in the declaration.

TAUNTON, J. The tenant in possession cannot be allowed to defend an ejectment, unless he enters into the common consent rule. Before the rule of court of Michaelmas term 1820, the term of admitting possession of certain specified premises was not imposed, and, therefore, the practice existed of having that expressly admitted in the rule, and annexing that rule to the Nisi Prius record, to prevent the necessity of producing evidence of the defendant's possession. Since that rule, which requires a specific admission in *all* cases, there can, in general, be no necessity for the production of the consent rule. Here, by the appearance of the party at the trial, he admitted he had entered into the consent rule; he ought, therefore, to have admitted all that he is required to confess by that rule. As he has not done so, the case is like that of an undefended ejectment, and there must be judgment against the casual ejector.

PATTESON, J., gave no opinion, having been absent (at the sittings in London) during the argument.

Rule absolute for judgment against the casual ejector.

(a) Reg. Gen. M. T. 1 G. 4, 4 B. & A. 196.

***BECQUET and Others v. MARY MAC CARTHY, Executrix of** [951
M. S. J. MAC CARTHY. Nov. 24.

To render a foreign judgment void, on the ground that it is contrary to the law of the country where it was given, it must be shown clearly and unequivocally to be so.

Where the law of a British colony required that, in a suit instituted against an absent party, the process should be served upon the King's Attorney-General in the colony; but it was not expressly provided that the Attorney-General should communicate with the absent party: Held, that such law was not so contrary to natural justice, as to render void a judgment obtained against a party who had resided within the jurisdiction of the Court at the time when the cause of action accrued, but had withdrawn himself before the proceedings were commenced.

THIS was an action on a judgment obtained by the plaintiffs against the testator in the Court of the Tribunal of First Instance in the Island of Mauritius. Plea, the general issue. At the trial before Lord Tenterden, C. J., at the London sittings after Trinity term 1830, the judgment of the colonial court was proved. In the introductory part of the judgment, the cause was stated to be between Madame Becquet (the present plaintiff), and others, residing at Port Louis, plaintiffs, and Mr. Mac Carthy, deputy paymaster of his Majesty's forces, "*at present resident at the Cape of Good Hope, cited at the domicile of the substitute of the king's attorney-general in the tribunals and courts of this colony,*" defendant; and the paymaster-general of his Majesty's forces, also defendant. It further appeared, by the minutes of the Court, that the plaintiffs had caused the defendants in that suit to be cited to appear before the tribunal of First Instance on the 16th of December, 1816, to answer the plaintiffs touching a fire which they alleged to have broken out in the paymaster's office, and consumed a house and premises and other property of the plaintiffs; and that the plaintiffs prayed the said tribunal that the defendants might be ordered to admit or deny that the fire first broke out in the paymaster's office, and spread from thence till it destroyed the plaintiff's premises and goods: and, in case of their admitting the same, that Mac Carthy individually, and likewise the administration of paymaster, might be condemned, jointly and severally, *under the 1384th [952 article of the code of laws of the colony, to reimburse to the plaintiffs their damages and costs; or, in case of denial, that an order of the Court might be made for proofs to be adduced, whereupon a report might be made in form of law, and a decision had. The minute then stated, that on the cause coming on for hearing on the 16th of December, 1816, default was granted against Mac Carthy, and the cause remanded to the 5th of May following, during which time it was ordered that the party in default should be re-cited. It was then stated, that by a writ served on the 21st of December, 1816, the sentence above mentioned was judicially notified to the defendants, with a citation to appear on the 5th of May, 1817, and that on that day, the Court, by its sentence, granted a definite default against Mac Carthy (he not appearing, nor any one for him), and ordered that the documents and readings of the parties appearing should be communicated to the substitute of the King's Attorney-General, together with the notes of the pleadings, in order to the necessary decree being made. This sentence, it was stated, the plaintiffs caused to be notified to the defendants. The point for the adjudication of the tribunal was stated to be, whether the administration of the paymaster-general of the British forces was responsible for the loss arising from the quasi crime imputed to the superintendent of such administration, under the 1384th article of the code, and whether the conclusions and condemnations prayed against the said administration, and against Mac Carthy personally, were well founded? The tribunal, by its judgment, given on the 9th of February, 1818 (and on which the present action was brought), condemned Mac Carthy in default in the legal indemnifications prayed, and in costs; and *the damages having been assessed, it was afterwards adjudged [953 that Mac Carthy should pay the plaintiffs 18,371 piastres.

On the trial of the present cause it was objected, that this judgment was invalid on the face of it; for the following among other reasons: First, that

assuming it to have proceeded on the 1384th article of the French Code Civil, livre 3, tit. 4, chap. 2 ("On est responsable non seulement du dommage que l'on cause par son propre fait, mais encore de celui qui est causé par le fait des personnes dont on doit répondre, ou des choses que l'on a sous sa garde"), and admitting that the fire first began in the premises occupied by Mac Carthy, it did not appear upon the face of the judgment that he was charged with any negligence, or that he had been guilty of any, by himself or his servants; and, secondly, that Mac Carthy was shown by the judgment itself, to have been absent from the island at the time of the proceedings against him, and it was contrary to justice that a man should be condemned unheard; on which head *Buchanan v. Rucker*, 1 Campb. 63, 9 East, 192, and *Cavan v. Stewart*, 1 Stark. N. P. 525, were cited. Lord Tenterden reserved the points; and the plaintiff proved that, by the law of the island, whenever an action was commenced against a person who had been once resident in it, but had afterwards absented himself, process was served for him upon the King's Attorney-General. The defendant then gave evidence to contradict the facts upon which the judgment proceeded. A verdict having been found for the plaintiffs, a rule nisi was obtained for entering *954] a nonsuit upon the objections taken to the judgment, or *for a new trial, upon the ground that the verdict was against evidence.

Campbell and *Hoggins* in this term showed cause. It is not clear that the evidence given to contradict the judgment was admissible, though it be generally assumed that a foreign judgment is only *prima facie*, and not conclusive evidence of a debt. [PARKE, J. The Vice-Chancellor has held, in *Martin v. Nicolls*, 3 Simons, 458, that the grounds of a foreign judgment cannot be reviewed in the courts of this country; and that a bill for a discovery and a commission to examine witnesses in Antigua, in aid of the plaintiff's defence to an action brought on the judgment in this country, was demurrable.] If that be so, the application for a new trial is answered. Then, as to the objection arising on the face of the judgment, it ought to appear clearly and demonstrably on the face of it, to be contrary to the law of the country where it was given, before a court in this country can be induced to say it is void on that ground. (They then proceeded to contend that this judgment was not clearly repugnant to the French Civil Code, art. 1384.)

Then as to this being a decree against Mac Carthy in his absence: First, this case is distinguishable from *Buchanan v. Rucker*, 1 Campb. 63; for there it did not appear that the defendant had ever been in the colony, or that the judgment was in respect of a cause of action which accrued in the colony. *Cavan v. Stewart*, 1 Stark. 525, shows only that a party is not to be charged on a foreign *955] judgment, unless it be proved that he was summoned, *or was once resident within the jurisdiction. Here, it appears that Mac Carthy was in the island when the action accrued, and continued to hold an office there when the proceedings were commenced. In *Douglas v. Forrest*, 4 Bingh. 686, it was held that an action was maintainable in the English Courts on a Scotch judgment of horning, obtained against a Scotchman born, who was absent, and had no notice of any of the proceedings. That case is precisely in point. Besides, here the party, though absent, was represented by the king's attorney-general; he was, therefore, virtually present. According to the Code Civil, livre 1, tit. 4, chap. 1, art. 114, "Le Ministère public est spécialement chargé de veiller aux intérêts des personnes présumées absentes; et il sera entendu sur toutes les demandes qui les concernent." And according to the Code de Procedure Civile, partie 1, livre 2, tit. 2, art. 69, "Seront assignés;—Ceux qui n'ont aucun domicile connu en France, au lieu de leur résidence actuelle: si le lieu n'est pas connu, l'exploit sera affiché à la principale porte de l'auditoire du tribunal où la demande est portée; une seconde copie sera donnée au procureur du roi, lequel visera l'original: Ceux qui habitent le territoire Français hors du Continent, et ceux qui sont établis chez l'étranger, au domicile du Procureur du Roi près le Tribunal où sera portée la demande, lequel visera l'original, et enverra la copie.

pour les premiers, au ministre de la marine, et pour les seconds, à celui des affaires étrangères."

The *Attorney-General*, Sir James Scarlett, and *Wightman*, *contrà*. First, the verdict was against evidence, *inasmuch as the facts proved showed distinctly that the fire did not originate on Mac Carthy's premises; and, [*956 secondly, the judgment is void on the face of it, because the complainants ought to have alleged in their pleadings, and to have proved by their witnesses, that the fire originated in Mac Carthy's premises by the negligence or imprudence of him or his servants. Here, what he is called upon to admit or deny is, not whether he or his servants have been guilty of negligence, but whether the fire originated in his house. Now, it may have so originated in his premises, without any fault of himself, or his servants, as by lightning, or the act of an incendiary. By the common law of England, a man was liable for so negligently keeping his fire, that the house or property of his neighbour was damaged thereby; and though the fact of the fire having first broken out in the defendant's house might be *prima facie* evidence of negligence, still it was necessary to charge him directly with negligence in the declaration, *Turbervil v. Stamp*, 1 Salk. 13; but, in the present case, negligence or default of the defendant, or his servants, is nowhere alleged or suggested upon the French proceedings, as it ought to have been to warrant the judgment against him. But assuming that the judgment is warranted by article 1384 of the Code Civil, still it appears that the proceedings were instituted in the absence of Mac Carthy. In *Buchanan v. Rucker*, 1 Campb. 63, Lord Ellenborough said, "It is contrary to the first principles of reason and justice that either in civil or criminal proceedings a man should be condemned before he is heard." It is certainly true that, according to the law of the island, process may be *served in the absence of the party upon the king's procureur; but, in order to make that a good [*957 practice, it ought to be shown that that officer is compelled to hold communication with the absent party. In *Douglas v. Forrest*, 4 Bingh. 686, the defendant had property in Scotland. *Cur. adv. vult.*

Lord TENTERDEN, C. J., now delivered the judgment of the Court.

This was an action brought upon a judgment recovered in the island of Mauritius. That island, at the time of the suit in which the judgment was given, belonged to the sovereign of this country, but the French law then prevailed there. The judgment was recovered by a person whose premises had been destroyed by a fire which began in the premises belonging to or occupied by the testator, at that time deputy paymaster of the forces in the island. Among other objections taken to the validity of this judgment, one was, that supposing the Court to have proceeded upon the article 1384 of the Code Civil, and taking it for granted that the fire originated in premises occupied by the testator, still that was not sufficient to make him liable, because the fire might have begun without the fault of the testator or any of his servants. The law of France being the law of the colony at the time when the judgment was pronounced, the French court was much more competent to decide questions arising upon that law than we can be. We ought to see very plainly that that court has decided against the French law before we say that their judgment is erroneous upon such ground. Now, upon a careful review *of the 1384th article, we cannot [*958 say that a person may not be answerable for damage done to his neighbour's property by reason of a fire originating upon his own premises, even although it cannot be proved that he or any person belonging to him set them on fire wilfully, or otherwise, for he is answerable, according to that article, *du dommage que l'on cause par le fait des personnes dont on doit repondre, ou des choses que l'on a sous sa garde*; that is, for whatever damage is occasioned by the things which he had under his care. Now, that may apply to a house. Indeed, by the law of this country before it was altered by the statute 6 Ann. c. 31, s. 6, if a fire began on a man's own premises, by which those of his neighbour were injured, the latter, in an action brought for such an injury, would not be bound in the first instance to show how the fire began, but the presumption

would be (unless it were shown to have originated from some external cause) that it arose from the neglect of some person in the house. We cannot then say that a French judgment, founded on the article in question in the Civil Code, is necessarily bad, because it is not averred in the proceedings that the accident was caused by negligence.

Another objection, and not an unimportant one, was, that the testator, when the proceedings were instituted against him, was absent from the island; and it was urged, that it was contrary to the principles of natural justice that any one should be condemned unheard, and in his absence. Proof, however, was given, that by the law of the colony, in the case of a person formerly resident in the island, absenting himself, and not leaving any attorney upon whom process in a
 *959] suit might be served, the procurator-general or his deputy was bound to take care of the interests of such absent party. It was said that the law of the island did not provide any means whereby the procurator-general or his deputy might be required to hold communication with, or receive directions from an absent person. There may, perhaps, be some deficiency in the law in that respect; but as the law of the island is, that the process shall be served upon the public officer, it must be presumed that he would do whatever was necessary in the discharge of that public duty; and we cannot take upon ourselves to say that the law is so contrary to natural justice as to render the judgment void in a case where the process was so served. For these reasons we are of opinion, that the rule for a new trial should be discharged. Rule discharged.

WRIGHT v. FAIRFIELD and Others, Assignees of BRACEWELL, a Bankrupt. Nov. 24.

The statute 10 Car. 2, st. 2, c. 2, s. 10, giving double costs on affirmance of a judgment upon writ of error, was held not to apply where the party about to sue out such writ had, in order to avoid execution, paid the damages and costs to the opposite attorney, with a notice to retain them in his hands; and the attorney had deposited the sum in a bank where it produced interest.

THE judgment in this case having been affirmed in error, (a) *Whiteman* obtained a rule to show cause why the Master should not allow double costs to the defendants in error, pursuant to 13 Car. 2, stat. 2, c. 2, s. 10. It appeared that before the writ of error was issued (viz. on the 1st of November, 1828), the attorney
 *960] for the plaintiff in error paid the damages and costs in the court below, to the attorney for the defendants in error, giving him at the same time this notice:—"Take notice that you are required to retain in your hands the amount of the damages and costs in this cause, which amount is paid by the defendant to avoid execution, and without prejudice to any proceedings he may be advised to take relative to the judgment entered up," &c. In consequence of this communication, the attorney for the defendants in error deposited the money in a bank at Liverpool, where it remained at the time of this application. The bank allowed 3½ per cent. interest on the deposit. The judgment below was affirmed; but the Master refused, on taxation, to allow double costs.

F. Pollock and *Tomlinson* now showed cause. The statute 13 Car. 2 only applies where the writ is sued out before execution. The double costs are there given "for the delaying of execution." And the remedy provided by the earlier statute, 3 Hen. 7, c. 10, is expressly confined to cases where the writ is sued out "afore execution had." Here, it is true, there has been no formal execution, but that which has taken place is tantamount to it. The defendants in error have had the money in their power, and it has yielded them interest while the writ of error was depending.

Wightman, contrd. This case is within the intention of the statute of Charles. The plaintiffs have been prevented, by the writ of error, from recovering that

(a) See p. 727, ante.

which would have been the result and produce of an execution. The attorney, indeed, received the amount of damages and costs, but he was desired to retain it in his hands, so that it was of no benefit to the plaintiffs. ***[Lord TENTERDEN, C. J. He was not obliged to do so.]** Still he was not perfectly [*961] safe in paying it over. This cannot be compared to cases where an execution has been levied and the party has actually received the money. **[PARKE, J. In those cases, the party would have been bound to refund on a reversal of the judgment, as the defendant in error would here if his attorney had paid the money over to him.]** Here the execution was at least virtually delayed by the announcement of an intended writ of error, which was afterwards sued out and acted upon. **[PARKE, J. The defendants in error might have taken out execution, if they were dissatisfied with the proposal of the other party. And in case of an execution, the plaintiff in error might still have given a notice to retain the proceeds.]**

Lord TENTERDEN, C. J. I think this is not a case within the statute of Charles. The object of that act was to prevent the staying off of executions by frivolous writs of error. It cannot be said that the proceeding of the plaintiff in error in this case was of such a description. The money was paid before the writ issued, and produced interest while it was depending. The rule must be discharged.

PARKE, J. The delay contemplated by this act is where the writ of error operates as a supersedeas of execution. But here the object of an execution had already been answered, for the damages and costs were paid. There is therefore, no ground for the rule.

TAUNTON, J., concurred.

***PATTESON, J.** By 13 Car. 2, st. 2, c. 2, s. 10, double costs are given [*962] "for the *delaying of execution*;" and in sect. 8, this clause is said to be enacted for further remedy against the mischiefs contemplated in a statute, 3 Ja. 1, c. 8, made "for avoiding unnecessary *delays of execution*," and in which certain recognisances are required before any *stay of execution* shall be made or supersedeas awarded in the actions there specified. I think the present case does not come within the meaning of these statutes. Rule discharged.

SHORT and Others v. SPACKMAN. Nov. 24.

The plaintiffs, who were brokers, bought goods of the defendant, on account of H., and by his authority. The purchase was made in their own names, but the vendor was told that there was an unnamed principal. The plaintiffs afterwards, under a general authority from H., contracted to sell the same goods, which the defendant had not yet delivered. H., on hearing of the latter contract, told the plaintiffs that he would have nothing to do with the goods, either as buyer or seller; and in this they acquiesced. The defendant then refused to deliver the goods, and the plaintiffs sued him for damages sustained by them in consequence: Held, that the renunciation of the contract by H., and the plaintiffs' acquiescence in it, formed no objection to the right of the plaintiffs to recover.

ASSUMPSIT for not delivering goods. At the trial before Lord Tenterden, C. J., at the sittings in London after Trinity term 1831, a verdict was found for the plaintiffs for 600*l.* subject to a reference. The arbitrator made his award, and annexed to it, at the request of the defendant's counsel, a statement to the following effect:—The plaintiffs being brokers, and authorized by one Hudson to buy for him twenty tuns of Greenland whale oil, employed Bentley, an oil broker, to make such purchase for them. Bentley applied to the defendant to sell that quantity to the plaintiffs. The defendant at first refused to sell to the plaintiffs; but, upon being informed by Bentley that they were *purchas- [*963] ing not for themselves, but as brokers for unnamed principals, he agreed to sell to them; and bought and sold notes, signed by Bentley, were sent by him to the plaintiffs and defendant, in which the goods were stated to be

"Bought for Messrs. Short, Brown, and Bowyer" (the plaintiffs), "of Mr. W. F. Spackman" (the defendant), on the terms therein specified to be paid for by the buyers in ready money. The plaintiffs sent a corresponding bought note to Hudson, their principal; and they afterwards, under a general authority from him, sold the goods for his account, through another broker, to Messrs. Buck and Co. The bought and sold notes in this transaction mentioned the plaintiffs and Buck and Co., as the buying and selling parties. On this sale being communicated to Hudson, he returned the sold note, which had been sent to him, declaring that he would have nothing to do with the oil as purchaser or seller; and to this the plaintiffs assented. The defendant afterwards refused to deliver the oil in pursuance of his agreement, and the plaintiffs, being unable to fulfil their engagement with Buck and Co., were obliged to pay them a sum of money in satisfaction, the market having risen since the last-mentioned contract. It was contended, on behalf of the defendant, that Hudson's repudiation of the contract, and the acquiescence of the plaintiffs therein, put an end to the engagement between the plaintiffs and defendant. The arbitrator, however, was of opinion that these facts did not affect either the rights of the defendant as against Hudson, or the rights and liabilities of the plaintiffs and defendant. He therefore awarded that the defendant should pay the plaintiffs the amount of the loss sustained by them in their settlement with Buck and Co. *A rule nisi *964] was obtained this term for setting aside the award, on the ground that the action was not maintainable upon the facts above stated.

F. Pollock and *F. Kelly* now showed cause. The arbitrator has taken a right view of this case. It cannot be contended that on the supposed repudiation of these contracts by Hudson, the plaintiffs remained liable to the purchasers, and yet were without remedy against the sellers. The plaintiffs had contracted, as brokers, for an unknown principal. Notwithstanding his subsequent refusal to have anything to do with the purchase or sale, he and they both remained liable to the respective parties, and retained their rights as against them. In this respect any acquiescence of the plaintiffs in an alleged repudiation of the engagements entered into by them, could make no difference, whatever might be its effects as between the plaintiffs and Hudson. Supposing the markets had fallen, the defendant might have sued either the plaintiffs or their principal for not accepting the oil: and they must equally retain their rights as against him.

Sir James Scarlett and *Tomlinson*, *contrd.* The plaintiffs were not entitled to bring this action. They sold under a general, not a specific authority; and in such a case, by the law merchant, the principal vendor has a right to know the name of the vendee, and if he has grounds for disapproving of the party, to renounce the contract. The payment, therefore, which the plaintiffs made to Buck and Co. was in their own wrong. It was equally so if Hudson had not a right to break off his contract with the vendees. Further, it was the duty of *the plaintiffs, when Hudson renounced this contract, to communicate *965] that fact to the defendant, who might then have chosen whether he would acquiesce in the repudiation, or insist on the agreement being fulfilled. If he had so insisted, it would then have been time enough for the plaintiffs to put themselves in Hudson's place. But they have volunteered to take up his contract, and that with a knowledge that the defendant would never have dealt with them as principals. Hudson's rejection of the bargain did not operate as a transfer of his interest in it to the plaintiffs; and in the absence of such transfer, or of any authority from Hudson, they had no right to sue the defendant.

Lord TENTERDEN, C. J. I had at first some difficulty in coming to the conclusion that the plaintiffs, situated as they were in this case, could sue upon the contract for their own benefit. But on looking to the contract itself, there appears nothing to prevent it. The form of the bought note is, "Bought for Messrs. Short, Brown, and Bowyer," twenty tuns of Greenland oil, at so much per ton, to be paid for by the buyers in ready money. The sold note is in the like form. In both the plaintiffs appear as the principals. The rest of the facts are *dehors* the present question. The rule will therefore be discharged.

PARKE, J. There was no fraud upon the defendant in this case. He was informed that there was an unknown principal, and such was the fact. It is found that the plaintiffs were authorized by Hudson to buy the oil of the defendant, and the contract was binding both on them, and, if the defendant chose to enforce it, on *Hudson. Then it is said the contract was put an end to by what is called the repudiation on Hudson's part: that is, by his [*966] informing the plaintiffs that he would have nothing more to do with the purchase or sale, and by their acquiescing in such determination. But this is no more, in effect, than if Hudson had thought proper to sell the benefit of his contract to any other person, which he might have done without the consent of the plaintiffs: and his doing so would have been nothing to the defendant. It clearly would not have determined the contract. I think, therefore, that the arbitrator came to a right conclusion.

TAUNTON, J. I am of the same opinion. The alleged repudiation of the contract by Hudson was not a circumstance of which the defendant can take advantage.

PATTESON, J. Upon the bought and sold notes the plaintiffs appear to purchase as principals. To show that they acted as brokers, other facts must be imported into the case; and upon those facts it appears that they were duly authorized as brokers. What happened afterwards cannot affect their right to recover.

Rule discharged.

PALMER v. COHEN. Nov. 25.

An executor may, under the stat. 17 Car. 2, c. 8, s. 1, enter up judgment on a verdict obtained by his testator in an action for a libel.

THIS was an action for libel. The plaintiff obtained a verdict at the last Summer assizes for Sussex, and died before the beginning of the present term. His *executor entered up judgment. *Platt* obtained a rule nisi this term for [*967] setting it aside with costs, on the ground that an executor could not enter up judgment on a verdict obtained by his testator, where no right of action would have survived to the executor.

Comyn now showed cause. The power is given in express words by the statute 17 Car. 2, c. 8, s. 1. The act 8 & 9 W. 3, c. 11, s. 6, which enables executors to proceed if the plaintiff die between interlocutory and final judgment, is confined to such actions as the executors might originally have prosecuted, but the former statute has no such qualification.

Platt, contrd. The preamble of the 17 Car. 2, c. 8, recites the act to be passed "for the avoiding of unnecessary suits and delays." It does not, therefore, apply to cases where no suit could be brought by the executors, and where, consequently, none was to be avoided. If executors could enter up judgment in a case where they could not be parties, they would have an undue advantage; for the defendant in such a case cannot move for a new trial. [*Comyn*, as to this objection, mentioned *Griffith v. Williams*, 1 Crom. & Jerv. 47, where in an action for breach of promise of marriage, the Court of Exchequer said, that although the plaintiff had died, they should have no difficulty in imposing such terms as would enable the parties to go to another trial if necessary. Lord TEN-TERDEN, C. J. It might be done in an action of this kind, as well as in a mere action of debt.]

Per Curiam. As to the objection drawn from the preamble of 17 Car. 2, c. 8, it is sufficient to say that *the remedy may go beyond the mischief [*968] recited. The words of the statute are express, and no question has been raised on this point since it passed.

Rule discharged

THOMPSON and Another v. JAMES PERCIVAL and CHARLES PERCIVAL. Nov. 25.

In assumpsit against two defendants for goods sold, they pleaded the general issue, whereupon issue was joined in Michaelmas term 1830, and notice of trial given for the sittings after that term. Continuances were entered on the record to the 23d of May, 1831. On the 14th of May in that year one of the defendants obtained his certificate under a commission of bankrupt, and on the 5th of June he pleaded his bankruptcy puis darrein continuance, to which the plaintiffs demurred; but this plea and demurrer were not entered on the nisi prius record. The cause was tried on the 29th of June, and a general verdict found against both the defendants. The Court set aside this verdict for irregularity, on the ground that the jury had given an absolute verdict as to both defendants, whereas they should have been summoned only to try the issue as to one, and to assess contingent damages as against the other.

ASSUMPSIT for goods sold and delivered. At the trial before Patteson, J., at the sittings in London after last Trinity term, a verdict was found for the plaintiffs, damages 67l. *Campbell*, on a former day in this term, obtained a rule to set aside the verdict for irregularity, with costs, and for a new trial. It appeared that, at the trial of the cause, the defendants' counsel suggested that James Percival had pleaded puis darrein continuance, a plea of his bankruptcy and certificate, to which the plaintiffs had demurred generally; and it was urged that the trial ought not to go on till that plea had been determined, or a nolle prosequi entered thereon. The learned Judge not finding this plea on the record, thought he could not take notice of it, and he tried the cause. By the affidavits against this rule, it appeared that issue was joined in Michaelmas term 1830, and the record was passed, and notice of trial given for the sittings after that term. Continuances were entered down to the 23d of May, the first day of Trinity term. The certificate was allowed on the 14th of May, and on the 5th of June the plea was pleaded as of Trinity term, to which the de-
*969] murrer was filed on the 24th of June. There had been no joinder in demurrer. The trial was on the 29th.

Sir James Scarlett and Chilton showed cause. There is no irregularity in this case. The plaintiffs were not bound to set out this plea on the Nisi Prius record, nor to await the judgment of the Court on the demurrer. There are several answers to this application. The last continuance was to the 23d of May, and the certificate was allowed on the 14th, therefore, the plea on the 5th of June, pleaded as of Trinity term, was a nullity; it ought to have been pleaded, as of the last continuance before the 14th of May. *Rex v. Taylor*, 3 B. & C. 612. Then the record here was in the hands of the officer at Nisi Prius; the plaintiffs were not bound to make it up: and it was optional in them, whether they would try, or wait till the demurrer was determined, but they were not bound to wait. Where several parties are charged jointly, the Court will not allow one of them, by a dilatory plea, to postpone the trial against the rest. And if it is said that contingent damages should have been assessed against the party demurring, it is to be observed, that there had been no joinder in demurrer.

Campbell in support of the rule. The plea was not a nullity. In *Rex v. Taylor* an application was made to the Court to take the plea off the file. The plaintiffs here might demur, or traverse some fact in the plea, or might apply to the Court to have it taken off the file as in that case. This last course, however,
*970] was not taken. It was treated as a valid plea; for the plaintiffs demurred, and there is now an issue in law depending in this Court upon the plea. How can final judgment be entered up in this case? There is an issue in law upon which no decision has taken place, and there is an issue in fact with a verdict thereon, taken, not contingently, but absolutely, against both defendants. The plaintiffs might have entered a nolle prosequi against James, and proceeded against Charles; or, if they had wished to exclude James's testimony, there should have been a venire to try the issue as against Charles, and to assess contingent damages as against James.

Lord TENTERDEN, C. J. It is not without reluctance that I assent to making

the present rule absolute. It was certainly competent to the plaintiffs to put on the *Nisi Prius* record the plea of bankruptcy and the demurrer, and to take the record down to trial to assess the damages against James. If that had been done, he would not have been a competent witness for Charles. The verdict would then have been absolute as against the latter, but contingent against James. Now it stands absolute against both. We cannot say that there would have been the same verdict if the record had been so altered. The finding of the jury is quite inconsistent with the actual state of the pleadings at the time of the trial.

PARKE, J. This rule must be made absolute. The trial ought to have been a trial of the issue on the plea in bar as to the defendant Charles, and an assessment of damages only as against James. The *Nisi Prius* record might have been amended by the plea roll; but we cannot convert this verdict, which is absolute against both defendants, into a verdict against one, and an assessment *of damages against the other. The verdict is correct according to the *Nisi Prius* record. The rule must be absolute, and the plaintiffs may [*971] then elect, whether to try the issue in fact first, or wait for the judgment on the demurrer.

TAUNTON, J., and PATTESON, J., concurred.

Rule absolute.

The KING v. RICHARD CARLILE. Nov. 25.

Error was brought in K. B. upon a judgment at the Old Bailey, and one ground assigned was, that a material fact stated on the record was not true. This Court held such an averment inadmissible, and affirmed the judgment. The fact being as alleged by the defendant below, the court of oyer and terminer afterwards ordered the record to be amended, and their clerk, by a rule of the Court of K. B. with the consent of the crown, came into the latter Court, and made the amendment there.

Upon motion, afterwards, that the case might be again set down for argument: Held, that this Court could not rehear it after the expiration of the term in which judgment was given, though the Attorney-General consented; and that the only remedy was by writ of error to the House of Lords.

THE Court having decided, upon the writ of error brought in this case, that the defendant below could not aver a fact in contradiction to the record (*viz.* that only one of the justices named in the commission was present when the verdict was given), and the judgment having consequently been affirmed, (a) *Joshua Evans*, in the following Trinity term, obtained a rule to show cause why the record and proceedings returned with the writ of error in this prosecution should not be sent back by *procedendo* to the court of oyer and terminer in London. This motion was made for the purpose of obtaining from the inferior court an amendment of the record, conformably to the fact, which was as stated by the defendant below. Cause was shown in the same term, and *J. Evans*, in support of the rule, cited *Rex v. Atkinson*, 1 Wms. Saund. 249, n. (1), Cro. C. 410, 9th edit., and *Rex v. Kenworthy*, 1 B. & C. 711, to show that a **procedendo* was the proper course, the record being at present in this [*972] court. The Court, however, suggested that an application for an amendment might be made at the Old Bailey, and the rule for a *procedendo* was discharged.

At the ensuing October sessions at the Old Bailey it was moved that the record might be amended by the clerk of the sessions, and a true copy returned to the King's Bench for argument in the next term. It was objected that such a motion could not be carried into effect, the record having been returned with the writ of error into the King's Bench, and being, therefore, no longer in the power of this Court. (b) The court of oyer and terminer made an order that the

(a) In last Easter term; see p. 362, ante.

(b) As to the question whether the record itself, or a transcript only, is removed into the King's Bench on error from an inferior court, see *Richardson v. Mellish*, 3 Bing. 346; *Mellish v. Rich-*

record should be amended in the terms hereafter stated, but without any direction as to the course to be adopted for making such amendment. On the first day of the present term the clerk of the sessions attended in this court, and the following rule was made: "On the motion of Mr. *Evans*, and by consent of the Attorney-General, ordered, that the clerk of the sessions of oyer and terminer for the city of London, present here in court, do amend the record returned with the writ of error in this prosecution." He did thereupon amend the record so returned, and which had remained in the King's Bench, by inserting between the recital of the verdict and that of the judgment, these words: "And at the *973] *aforesaid, only one of the said last-mentioned justices, to wit, the said Newman Knowlys, recorder of the said city, was present in court." No other document was altered in pursuance of the order made at the Old Bailey. In this term

Joshua Evans moved that the case might be again entered in the crown paper for argument. Lord Tenterden, C. J., asked if there were any precedent for quashing the judgment delivered by the Court in a preceding term. *J. Evans* mentioned *Mellish v. Richardson*, 7 B. & C. 819. *Campbell*, amicus curiæ, observed, that in that case the rule for amending the judgment was enlarged to the next term by consent. A rule nisi was however granted.

The *Attorney-General*, on behalf of the crown, stated on a subsequent day, that he should not oppose a reconsideration of the record by the Court.

Steer (who now supported the rule, *Joshua Evans* having left the bar) was asked by the Court if any precedent had been found? None has been discovered; but, as the Attorney-General consents, the Court will probably allow a rehearing. In fact, no judgment has been given upon the real record.

PARKE, J.(a) I question whether the Court has any power, even by consent, to alter the judgment of a preceding term. During the same term the judgment is still in the breast of the Court, but it is not so afterwards, Co. Litt. 260 a. In *Mellish v. Richardson*, the rule was enlarged by consent to another term, but *974] the judgment would be *entered as of the same. The remedy is, to bring a writ of error upon our judgment in the House of Lords.

TAUNTON, J. In the absence of any precedent, I fear we have no authority to rehear this case. Our judgment, once pronounced, can only be vacated, after the expiration of the term, by writ of error to the House of Lords.

PATTESON, J., concurred.

The case was, however, adjourned, to give a further opportunity of searching for precedents, till the last day of this term, when

Steer said, none had been found. [PARKE, J. The officers of the Court have also searched, and can find none.] If the record, as amended, goes up to the House of Lords, it may be said that that is not the record upon which this Court decided; and that their judgment was not erroneous as the record then stood. Perhaps the Court will grant a fresh writ of error returnable here.

Lord TENTERDEN, C. J. That cannot be done. The only course that can now be taken, is to bring error in the higher Court. The amended record will go up to them, and will be the only one of which they can take notice.

The rest of the Court concurred.

Rule discharged.

ardson, 7 B. & C. 819, and the authorities upon the point referred to in those cases. Also, Bro. Abr. *Error*, pl. 127-8; Fitz. N. B. 45 F; Jenk. 31, pl. 61; Palm. 199; The Bishop of Ossory's case, Cro. Jac. 534; *Sampayo v. De Payba*, 5 Taunt. 82; note (1) to *Jaques v. Cesar*, 2 Wms. Saund. 100; Tidd's Practice, 714, 9th ed. and Supplement, 130.

(a) Lord TENTERDEN, C. J., had gone to attend the Privy Council.

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ACTION ON THE CASE.

1. A sheriff by virtue of a *fi. fa.* seized goods upon lands leased to a tenant, sold the same for less than a year's rent, and permitted them to be removed without paying the landlord the year's rent, which was due. The latter brought an action on the case against the sheriff, for such removal, and the Court refused, on payment into Court of the sum which the goods produced, to stay the proceedings until the plaintiff undertook to pay the costs of suit in the event of his not recovering more than the sum paid into Court. *Calvert v. Joliffe*, E. 1 W. 4. 418
2. In an action for maliciously indicting A. for perjury, it appeared that the defendant B., in 1824, preferred the indictment, and gave evidence before the grand jury, that the bill was found, removed into K. B., and tried in 1827; and that B., who was then in custody, was brought into court under a habeas corpus obtained by his attorney, on the ground that he was a material witness; but he did not give evidence, and A. was acquitted. The Judge in his direction told the jury, that if the defendant did not appear at the trial as a witness from a consciousness that he had no evidence to give which would support the indictment, then there was a want of probable cause, and they should find for the plaintiff; but if his non-appearance did not proceed on that ground, then there was no proof of want of probable cause, and they should find for the defendant. The defendant offered no evidence, and the jury found for the plaintiff: Held, upon error, and a bill of exceptions, whereby the objection stated to the summing up was, that the Judge himself ought to have

determined, upon the facts, whether there was probable cause, without leaving any question to the jury; that, under the circumstances, the motive which induced the defendant not to appear as a witness, was a question of fact for the jury, and they might be directed to conclude that there was or was not probable cause, and to find for or against the defendant, according to their opinion of the motive. *Taylor v. Willans (in error)* M. 2 W. 4. 845

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ANNUITY.

1. By the annuity act 58 G. 3, c. 141, s. 10, no enrolment is necessary where the annuity is charged on freehold or copyhold lands equal to it in value, over and above any other annuity charged or

secured on such lands. Such "other annuity," to be within the meaning of the act, must be directly and specifically charged on the lands, not merely secured in a manner which may by possibility affect them as by judgment entered up on a warrant of attorney. *Walford et Uz v. Marchant*, E. 1 W. 4. 815

2. Testator bequeathed a sum in long annuities, to be applied first to the payment of his debts, and a certain portion of it, afterwards, to vest in trustees for his daughter. On his death, a bill in Chancery was exhibited against his executor for an appropriation of the fund for the daughter's benefit; the executor admitted assets, and a decree was obtained for the appropriation, within two years of the death of the testator. It was not referred to a Master in Chancery to ascertain whether there were any debts outstanding; nor did it appear whether or not this was the fact. The daughter's annuity being afterwards sold, the purchaser brought an action to recover back the deposit money, on the ground that no title could be made. On a case stating these facts:

Held, that there was no sufficient title established; and that, at least in the absence of a Master's report, it lay upon the vendor to show that there were no debts outstanding which could affect the annuity. *Curtis v. Blow*, E. 1 W. 4. 426

8. A beneficed clergyman granted annuities by three several deeds, and (by the same deeds) made them chargeable on his living, which he thereby conveyed in trust for the grantee, for the more effectually raising and enforcing payment of the annuities out of the living: and he also gave as a security for payment of the annuities, three warrants of attorney, with defeasances in the common form, to confess judgment at the suit of the grantee.

On motion to set aside the warrants of attorney, as being a charge upon the living in evasion of the statute 18 Eliz. c. 20, the court held that this did not appear; that the covenants in the annuity deed for payment of the annuity might be good, though the rest were void, and that payment of the arrears, under these covenants, might well be enforced by the warrants of attorney. *Gibbons v. Hooper, Clerk*, T. 1 W. 4. 784
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4. A. having agreed with B. to advance him a sum of money, and to pay off an annuity formerly granted by him, B. executed a deed, whereby, in consideration of 1050*l.*, he covenanted to pay an annuity to A., and assigned to him certain dividends upon trusts for the purpose of securing the annuity. The 1050*l.*, were paid to B. the grantor, who directly returned to the grantee the sum necessary for paying off the annuity; and he immediately paid it over for that purpose. In

the memorial enrolled pursuant to 58 G. 3, c. 141, the consideration for the present annuity was stated to be 1050*l.*, without any notice of the former annuity: Held, that this statement was sufficient.

Held, also, that it was not necessary to notice in the memorial, a covenant in the annuity deed, that if the grantor went abroad, whereby the expense of insuring his life should be increased, the grantee might retain such additional amount out of the dividends; and, if they proved insufficient, the grantor should make up what was wanting.

Under the head "Nature of the Instrument" in the memorial, the deed was described as an "Assignment of dividends, and annuity deed to secure the same." Held, that this was sufficiently correct. *Cane v. Lovelace*, T. 1 W. 4. 767

APOTHECARY.

- A. bound himself apprentice to an apothecary, who resided eight miles from H. The apothecary then took a house at H., in which A. resided, and attended several patients there, the apothecary coming over occasionally, and being consulted by the defendant about the patients: Held, that this was a practising by A. as an apothecary within the meaning of 55 G. 3, c. 194, s. 20. *The Master, &c., of the Company of Apothecaries v. Greenwood*, T. 1 W. 4. 708

APPEAL.

1. Guardians and directors of the poor were incorporated by statute, and were thereby ordered to hold certain courts and meetings, at which any rate payer might object to their proceedings or accounts, and such objection should be taken into consideration; and if the matter could not at that time be settled to the satisfaction of the complaining party, it should be adjourned to the next court, to be there finally heard and determined.

A subsequent clause provided, that any person aggrieved by anything done in pursuance of the act, and for which no particular method of relief was already appointed, might appeal to the quarter sessions to be holden within four calendar months next after the cause of complaint should have arisen.

A rate payer appealed to the sessions against an order of the directors for the payment of sums due on annuities, and as interest on loans. The order had been made less than four months back, but the debts had not been incurred, nor the annuities granted within four months: Held, that the appeal was not barred by the first-mentioned clause of the act, and that the cause of complaint had arisen within four months. *The King v. The Justices of Salop*, E. 1 W. 4. 145

2. When the sessions on determining as

appeal have granted a case, but none has been stated, the Court will, under some circumstances, direct a mandamus to the justices who heard the appeal, to state a case.

But not where it is clear that such a proceeding could lead to no result; as where the chairman, in consequence of his own opinion and that of the court upon the facts, refused to sign any statement but one which would have excluded the point of law relied upon by the party demanding a case. *The King v. The Justices of Pembrokeshire*, E. 1 W. 4.

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- £. An appeal was entered and respited, entitled, "A. B. appellant, and the churchwardens and overseers of B. respondents;" and was stated to be against the allowance of the overseers' accounts. Before the next sessions, notice of the appeal, addressed to the overseers only, was served upon them, but no notice was given to the churchwardens, who, in fact, had not received or disbursed any money, or kept any account: Held, that the difference between the entry of appeal and the notice was immaterial, and that the churchwardens, having had no account to keep, were not entitled to notice as joint officers with the overseers. *The King v. The Justices of Norfolk*, M. 2 W. 4.

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APPORTIONMENT.

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See APOTHECARY.

ARBITRAMENT.

1. Declaration stated, that differences had arisen between the plaintiff and defendant respecting certain liabilities of the plaintiff on account of the defendant, in respect of bills of exchange to which the plaintiff had put his name, and which the defendant had negotiated; that the plaintiff had commenced an action against the defendant on account of his having negotiated the same, and also for the recovery of the bills; and that by an order made in the said action, the cause and all matters in difference between the parties were referred to arbitration. That the arbitrator made his award, whereby he directed the defendant to pay the plaintiff 10s., and that the defendant should, at the same time, deliver up to the plaintiff a bill of exchange for 300*l.*, therein particularly described, or give the plaintiff a bond of indemnity; and further, that the defendant should, at the same time, pay the plaintiff 848*l.*, unless he, the defendant, should then pay what remained due upon a judgment recovered by A.; and others against the defendant, in a certain action brought by the said A. and others against the plaintiff, as the

drawer of a certain bill of exchange for 300*l.*, bearing date the 18th of May, 1826, drawn by defendant upon, and accepted by, one C. N. and payable to the order of the defendant, and by him endorsed to the said A. and others, and likewise cause satisfaction to be entered on the judgment-roll in such action; and likewise deliver up to the plaintiff the last-mentioned bill of exchange: And the arbitrator further awarded, that on performance of the award as aforesaid, the plaintiff and defendant should execute mutual and general releases.

Plea, first, that a bill of exchange, therein particularly described, had been drawn, endorsed by the plaintiff, and by him delivered to the defendant, and that the liability of the plaintiff, in respect of the same, was a matter in difference submitted to the arbitrator, and that he had not awarded concerning it.

Secondly, the like as to an action which was depending between the plaintiff and defendant at the time of the reference, and to divers other pecuniary matters, claims, and demands.

Thirdly, the like as to a judgment recovered by A. and others, against the plaintiff, which was unsatisfied at the time of making the award, and which it was disputed whether the plaintiff or defendant ought to satisfy.

Fourthly, that there never was any judgment recovered, or action brought, by A. and others against the defendant on any such bill of exchange drawn by the defendant, as was mentioned in the award, and that performance of the award as to such judgment was impossible.

Fifthly, that the defendant never had any authority from A. and others to cause satisfaction to be entered on the judgment-roll, in such last-mentioned action, and, therefore, that it was wholly out of his power to do so; nor was it in his power to deliver up to the plaintiff the bills of exchange in the award mentioned, and which were endorsed to and outstanding in the hands of other persons.

Upon demurrer; it was held,

That the first three pleas were bad, because the arbitrator, by having awarded mutual and general releases, must be deemed to have adjudged and finally decided upon the matters in those pleas respectively mentioned, and the general release would be an answer to any actions or claims founded upon them:

And, that the fourth and fifth pleas were bad, because, although it might be impossible for the defendant to perform certain parts of the award therein mentioned, yet the award in each instance gave an alternative which he could perform. *Wharton v. King*, T. 1 W. 4. 528

2. A verdict was taken for 8000*l.* subject to an award, to be made by a certain day, as to the amount of damages. The arbi-

trator accidentally let the day pass without making his award, and the defendant's attorney would not consent to the time being enlarged. The Court granted liberty to the plaintiff to enter up judgment and issue execution forthwith for the whole amount of the verdict, unless the enlargement were consented to. But at the instance of the bail, they ordered that no execution should issue against them before a certain time, when it appeared that the defendant, who was abroad, would probably be in England. *Taylor and Another, Assignees of Walsh v. Gregory*, T. 1 W. 4. 774

3. On an award directing payment of money at a certain time, interest, from that time till payment, may be recovered by action, but not by motion for an attachment. *Churcher, Gent., One, &c., and Stringer, Gent., One, &c.*, T. 1 W. 4. 777

4. An order of reference was made in an action where the main point in dispute was, whether certain goods, the value of which (namely 246*l.*) the defendants proposed to set off against the plaintiff's claim, had been bought by the plaintiff of the defendants, or of A. B. The question stated in the order was, whether or not the defendants were entitled to set off the sum of 246*l.* The arbitrators (as was alleged) being unable to decide the main point, but finding that, at all events, a small deduction (8*l.* 12*s.*) was to be made from the 246*l.*, awarded, in the terms of the order of reference, that the defendant was not entitled to set off 246*l.* A rule was afterwards obtained for setting aside the award as not being final, but discharged. The plaintiff then brought an action of debt on the award; and the defendants pleaded a set-off to the amount of 237*l.* 10*s.* 6*d.* :

Held, that they could not now set off the difference between the 246*l.* and 8*l.* 12*s.*, for that the award was conclusive as to the sum now sought to be set off, as well as that mentioned in the order of reference; and if the arbitrators had gone upon a mistaken ground, their decision could not be questioned in this form. *Johnson v. Durant and Another*, M. 2 W. 4. 925

ASSIGNMENT.

See SETTLEMENT by Apprenticeship, 5.

ASSUMPSIT.

• See CONSIGNOR AND CONSIGNEE.

1. In assumpsit on warranty of a horse, the consideration stated for the warranty was, that the plaintiff would purchase the horse for 68*l.*; but the consideration, as proved, was, that the plaintiff would pay that sum, and, if the horse was lucky, would give the defendant 5*l.* more, or the buying of another horse: Held no variance, the conditional promise omitted in the declaration being too vague to be

legally enforced, and not amounting, in point of law, to a promise. *Guthing v. Lynn*, E. 1 W. 4. 282

2. Goods were sold at six months' credit, payment to be then made by a bill at two or three months, at the purchaser's option: Held, PARKE, J., dubitante, that this was in effect a nine months' credit, and, consequently, that an action for goods sold and delivered commenced within six years from the end of the nine months was in time to save the statute of limitations. *Helps v. Winterbottom*, E. 1 W. 4. 431

3. Declaration stated that the plaintiff had supplied goods to Elizabeth S. for the sum of 16*l.*, and in consideration of the premises and of the said sum being unpaid, E. S. afterwards promised to pay as soon as it was in her power. Averment, that though it was afterwards in her power, she refused. The proof was, that the goods were supplied to her while she was a feme covert, living apart from her husband, and that she, after his death, promised to pay: Held, that as the price of the goods originally constituted a debt from the husband, and not from the defendant, the ground of the supposed moral obligation on which the assumpsit proceeded was not properly set out in the declaration, and therefore the plaintiff could not recover.

Semble, that a moral obligation is not in every case a sufficient consideration for a promise. *Littlefield, Executrix, v. Shee*, M. 2 W. 4. 811

4. R. agreed to supply W. with straw, to be delivered at W.'s premises, at the rate of three loads in a fortnight, during a specified time; and W. agreed "to pay R. 88*s.* per load for each load of straw so delivered on his premises" during the above period. After the straw had been supplied for some time W. refused to pay for the last load delivered, and insisted on always keeping one payment in arrear: Held, that according to the true effect of the agreement, each load was to be paid for on delivery, and that on W.'s refusal so to pay for them, R. was not bound to send any more. *Withers v. Reynolds*, M. 2 W. 4. 882

ATTORNEY.

See PRACTICE, 7. LIEN, 1. JUSTICES, 8.

1. An attorney having sued for the amount of his bill, which did not contain any item taxable by the statute 2 G. 2, c. 28, the defendant (who had before tendered part of the amount, but objected to the rest as unreasonable) moved to have it referred to the Master, on the ground of the general authority possessed by the Court over its officers. The Court (after conference with the other Judges) refused to interfere. *Dagley, Gent., One, &c. v. Kentish*, E. 1 W. 4. 411

1. The clause of 8 Jac. 1, c. 7, s. 1, requiring attorneys to deliver a bill to their clients before charging them with any of the "fees or charges" in the act mentioned, is confined to business done in the king's courts of record at Westminster. *Reynal, Gent., One, &c., v. Smith, Gent., One, &c.*, T. 1 W. 4. 469
2. A motion to strike an attorney off the roll on the ground of misconduct, and the want of regular service, in his clerkship, comes too late when the party has been three years and a half admitted. *In the Matter of —, Gent., One, &c.*, T. 1 W. 4. 766

AWARD.

See ARBITRAMENT, 2.

BAIL.

See ARBITRAMENT, 2. PRACTICE, 5. STATUTE OF LIMITATIONS, 1.

BALANCE OF ACCOUNT.

See COURT OF REQUESTS.

BANKRUPT.

1. A sheriff seizing under a fi. fa., and afterwards selling, the goods of a person who has committed an act of bankruptcy, is liable in trover to the assignees (under a commission issued within two months), though it do not appear that at the time of seizure, or when the sale began, the sheriff knew of the act of bankruptcy. *Dillon and Spence v. Langley*, E. 1 W. 4. 181
2. A farmer and grazier had frequently, before September 1825, when the new bankrupt act, 6 G. 4, c. 16, came into operation, and in some few instances after, purchased cattle with a view to resale, and not for the purpose of his farm. A commission of bankrupt having issued against him after September 1825, it was held in an action brought to try the validity of the commission, that the acts of buying before that period were evidence to explain the quality of the subsequent acts.
The forty-fourth section of the 6 G. 4, c. 16, does not entitle assignees of a bankrupt, and persons acting in their aid, to double costs on a verdict found for them in an action for things done in pursuance of the statute. *Worth and Another v. Budd*, E. 1 W. 4. 172
3. A debtor deposited the title deeds of houses with his creditor as a security, and afterwards executed an assignment of his interest in the houses to the same party; but this instrument was never registered, pursuant to the statute 7 Ann. c. 20. The debtor afterwards became bankrupt, and the assignment of his effects under the commission was duly registered. The assignees brought an action against the creditor for the rents

of the houses which he had received from the time of the assignment made to him by the bankrupt: Held, that although this instrument was void, the rents, which the defendant, being equitable mortgagee, had received, could not be taken out of his hands by virtue of the registered assignment under the commission. *Sumpter and Others, Assignees of Pound v. Cooper*, E. 1 W. 4. 228

4. In an action for maliciously suing out a commission of bankrupt, it must be averred and proved that the commission was superseded before the commencement of the action: and if this fact be not proved, the plaintiff ought to be nonsuited, though it was not averred in the declaration, and though the defendant, who might have demurred for the omission, had not done so. *Whitworth v. Hall*, T. 1 W. 4. 695
5. By indenture of demise, reciting that the lessee had purchased certain fixtures on the premises, on condition of their being repurchased as after mentioned, it was agreed between the lessor and lessee, and the lessor covenanted, that on the expiration or other sooner determination of the term, he, the lessor, should and would take the fixtures at such price as they should be appraised at by two competent persons, one to be named on each side.
The lessee became bankrupt, and his assignee declined the lease (which was delivered up), but he required the fixtures to be repurchased, and brought an action of covenant against the lessor for not appointing an appraiser: Held, that as by 6 G. 4, c. 16, s. 75, the bankrupt, on delivering up the lease, was discharged from all the covenants on his part, performance of the covenant in question could not be enforced by the assignee against the lessor. *Kearsey, Assignee, v. Carstairs and Others*, T. 1 W. 4. 716
6. Assignees under 6 G. 4, c. 16, may maintain an action for unliquidated damages which have accrued before the bankruptcy by non-performance of a contract. *Wright v. Fairfield and Others*, T. 2 W. 4. 727
7. A defendant compromised an action for libel, by agreeing to apologize, and pay the plaintiff's costs. The apology was made, and a rule of Court obtained, ordering the defendant to pay the costs, amounting to 67l. On default made, an attachment issued, and the defendant was committed. While in custody he became bankrupt, and obtained his certificate:
Held, that the sum named in the rule of Court, was a debt which might have been proved under the commission, and that the defendant was entitled to be discharged out of custody. *Riley v. Burne*, T. 1 W. 4. 779

BARON AND FEME.

1. A married woman being administratrix

received a sum of money in that character, and lent the same to her husband, and took in return for it the joint and several promissory note of her husband and two other persons, payable to her with interest: Held, that although she could not have maintained any action upon the note during the lifetime of her husband, yet that he having died, and it having been given for a good consideration, it was a chose in action surviving to the wife, and that she might maintain an action upon it against either of the other makers at any time within six years after the death of her husband, and recover interest from the date of the note. *Richards v. Richards*, T. 1 W. 4. 447

2. Declaration stated that the plaintiff had supplied goods to Elizabeth S. for the sum of 16*l.*, and in consideration of the premises and of the said sum being unpaid, E. S. afterwards promised to pay as soon as it was in her power. Averment, that though it was afterwards in her power, she refused. The proof was, that the goods were supplied to her while she was a feme covert, living apart from her husband, and that she, after his death, promised to pay: Held, that as the price of the goods originally constituted a debt from the husband, and not from the defendant, the ground of the supposed moral obligation on which the assumpsit proceeded was not properly set out in the declaration, and therefore the plaintiff could not recover. *Littlefield, Executrix, v. Shee*, M. 2 W. 4. 807

BASTARD.

See SETTLEMENT BY BIRTH.

BILL OF EXCHANGE.

- 1 A., R., and O. carried on business as partners, under the firm of Ashby and Co., from February 1820 to May 1824, when O. retired, and the other two partners agreed to liquidate all the debts due from the partnership; and they continued the business as partners, under the firm of Ashby and Rowland. In June 1824 S. agreed to become a member of this last-mentioned partnership, as from the 18th of May preceding, but his name was not to be introduced, and the business was still carried on under the names of Ashby and Rowland only.

In July 1824, H., being indebted to L., drew a bill of exchange in his favour upon Ashby and Co., which bill was accepted by the partner R. in the names of Ashby and Rowland. H., the drawer of the bill, had had dealings with the firm of A., R., and O.; but whether that firm was indebted to him when the bill was drawn did not appear, nor did it appear that there had been any dealings between H., the drawer, and A., R., and S., after the entrance of S. into the partnership. The name of S. was never used or made known to any person dealing with the firm: Held, that A., R., and S. were liable upon this

bill as acceptors. *Lloyd v. Ashby and Others*, E. 1 W. 4. 23

2. It is no defence to an action by the payee against the maker of a promissory note, that the payee had agreed to convey an estate to the maker in consideration of a sum of money then paid or secured to be paid to the maker (being the sum mentioned in the note), and of a further sum to be paid at a future day, and that such an estate had never been conveyed. *Spiller v. Westlake*, E. 1 W. 4. 155
3. A presentment of a bill of exchange for payment at a house in London, where it is made payable, at eight o'clock in the evening of the day when it becomes due, is sufficient to charge the drawer, although at that hour the house be shut up, and no person there to pay the bill. *Wilkins and Another v. Jadis*, E. 1 W. 4. 188
4. S. being indebted to a firm in which he was partner, gave a note in the name of another firm to which he also belonged, in discharge of his individual debt. The payees endorsed it over, and the endorsee sued the parties who appeared to be makers: Held, that this note was made in fraud of S.'s partner in the second firm, and could not be enforced against him by the payees, and that, at least under these circumstances of suspicion, the endorsee could not recover without proving that he took the note for value, though no notice had been given him to prove the consideration: Held also, PARKE, J., dissentiente, that in all cases, where, from defect of consideration, the original payees cannot recover on the note or bill, the endorsee, to maintain an action against the maker or acceptor, must prove consideration given by himself or a prior endorsee, though he may have had no notice that such proof will be called for. *Heath v. Sansom and Evans*, E. 1 W. 4. 291
5. In an action by the payee against the acceptor of a bill of exchange drawn for the balance of purchase-money of articles bought at a sale, it is no defence that two months after delivery of the goods to the vendee, the vendor forcibly retook possession of them; for the vendee cannot treat that act as a rescinding of the contract, but must bring trespass. *Stephens v. Wilkinson and Another*, E. 1 W. 4. 320
6. A promissory note payable to the bearer made in England, is by the statute 3 & 4 Ann. c. 9, transferable by delivery in a foreign country. *De la Chaumette v. The Bank of England*, E. 1 W. 4. 385
7. See BARON AND FEME, 1.
8. A bill drawn in Ireland upon a person in England, is not an inland bill, and may therefore be accepted without writing on such bill, notwithstanding the stat. 1 & 2 G. 4, c. 78, s. 2. But that section (as well as 9 G. 4, c. 24, s. 8) applies to bills drawn in Ireland upon persons there. *Mahoney v. Ashlin*, T. 1 W. 4. 478
9. A having given his daughter on her mar-

riage the stock of a public-house, amounting in value to 1200*l.*, she and her husband signed the following instrument: "On demand, we promise to pay to A. or his order 1200*l.*, for value received in stock, &c., this being intended to stand against me, M. (the daughter) as a set-off for that sum left me in my father's will above my sister Ann's share:" Held, that this was not a promissory note. *Clarke v. Percival*, T. 1 W. 4. 660

10. Defendant, in discharge of a debt to plaintiff, endorsed bills to him, which had been drawn and endorsed to the defendant by parties in France, but were accepted by a person in this country, and payable at a banker's here. Plaintiff endorsed them over. On their being presented for payment, the banker's clerk inadvertently cancelled the acceptances, but immediately wrote opposite to them, "cancelled by mistake;" and the bills were not however paid, there being no effects. The holders then presented them at a house to which they were addressed in case of need, but that house refused payment in consequence of the cancelling; they would otherwise have honoured them. A re-acceptance was obtained from the acceptor, but he did not pay the bills. The plaintiff then took them up and returned them, regularly protested, to the defendant, who applied to the prior endorsers for payment, but they refused.

The defendant, who resided abroad, cited the drawers, the intermediate endorsers, and the plaintiff, before the tribunal of commerce at Lyons, for the purpose of obtaining a guarantee for himself against liability on the bills. That court adjudged him and the other parties, except the plaintiff, discharged from liability, and decreed that the bills should remain to the plaintiff's debit. The plaintiff then carried the cause to a court of appeal in France, which confirmed this decree, assigning as a reason that the cancelling of the acceptances operated as a suspension of legal remedies against the acceptor, and was equivalent to a delay granted him by the holders, with whom the plaintiff was identified, and, consequently, that the other parties to the bills were discharged.

Held, that the French courts had mistaken the law of England as to the effect of the cancellation; and, therefore, that the defendant was still liable at the plaintiff's suit for the debt in respect of which the bills were given, notwithstanding the decree. *Novelli v. Rossi*, T. 1 W. 4. 757

BISHOP.

See MANDAMUS, 2.

BOND.

See PLEADINGS, 6. LIEN, 2.

BRIBERY.

See CRIMINAL INFORMATION, 4.

BRIDGE.

By the statute 48 G. 3, c. 59, s. 5, no bridge thereafter to be erected or built, is to be repairable at the expense of the county, unless erected under the direction of the county surveyor, &c. This applies only to bridges newly built, not to a bridge merely widened or repaired since the passing of the statute. Trustees under a turnpike act having built a bridge across a stream, where a culvert would have been sufficient, but a bridge is better for the public, the county cannot refuse to repair such bridge on the ground that it was not absolutely necessary. *The King v. The Inhabitants of Lancashire*, M. 2 W. 4. 813

BROKER.

See EVIDENCE, 18.

BULLION.

See METALS.

BY-LAWS.

See CORPORATION, 2.

CANCELLATION OF ACCEPTANCE BY MISTAKE.

See BILL OF EXCHANGE, 10.

CANAL ACT.

See TOLL, 2.

CANAL COMPANY.

See POOR RATE, 1. TRESPASS, 5.

CA. SA.

See PRACTICE, 9.

CERTIFICATE.

See SETTLEMENT BY APPRENTICESHIP, 3.

By the general highway act 18 G. 3, c. 78, s. 64, the Court before which any indictment for non-repair of a road is tried, may award costs to the prosecutor if the defence appear to have been frivolous, or to the defendant, if it appear that the prosecution was vexatious. This section applies only to cases tried in the ordinary course; and where, on an indictment removed by the defendant by certiorari, the Court above had ordered a new trial, and the prosecutor's costs of both trials to abide the event; it was held that this special rule took away the authority given by the statute, and that the Judge could not certify in favour of the defendant. *The King v. The Inhabitants of Salwick*, E. 1 W. 4. 186

CERTIFICATE OF ORDINATION.

See EVIDENCE, 18.

CERTIORARI.

Rated inhabitants of a parish, who were prevented by rioters from entering the vestry room to attend a meeting called

for the purpose of imposing a church-rate, and who afterwards prosecuted the offenders, are parties grieved within the meaning of the statute 5 W. & M. c. 11, s. 8, and, therefore, entitled to costs on conviction of the defendants after removal of the case by certiorari. *The King on the Prosecution of Hubback and Others v. Thomkins and Others*, E. 1 W. 4. 287

CHARITABLE USE.

See DEED, 1.

CHATTEL INTEREST.

See DEVISE, 2.

CHOSE IN ACTION.

See BARON AND FEME, 1. EXECUTOR, 1.

CHURCH RATE.

See RATE, 2.

CHURCHWARDEN.

See CUSTOM, 1.

COACH PROPRIETOR.

In an action against a coach proprietor for negligence, it appeared that the coach travelled from the county of O. to the county of W.; that the plaintiff became an outside passenger for hire; that there was luggage on the roof of the coach, and no iron railing between the luggage and the passengers; and that the plaintiff, being seated with her back to the luggage, was, by a sudden jolt, thrown from the coach, and her leg was thereby broken in the county of O., where she remained some time to be cured; but before she was fully recovered she removed to the county of W., where further medical attendance became necessary, and expense was consequently incurred. The learned Judge directed the jury to find for the plaintiff, if they were of opinion that the injury sustained was occasioned by the negligence of the defendant. The jury found for the plaintiff: and stated that they so found on account of the improper construction of the coach, and of the luggage being on the seat: Held, that the case was properly submitted to the jury, and that the facts found specially by them amounted to negligence in the defendant:

Held also, that the inconvenience suffered, and expense incurred, by the plaintiff in the county of W., was *material evidence of a matter in issue* arising there, within the meaning of the undertaking given by the plaintiff, in answer to a motion to change the venue. *Curtis and Wife v. Drinkwater*, E. 1 W. 4. 169

COAL MINES.

See POOR RATE, 2.

COMMENCEMENT OF ACTION.

See EVIDENCE, 14.

COMPENSATION.

See HUNGERFORD MARKET COMPANY.

COMPOSITION.

1. A debtor being unable to meet the demands of his creditors, they signed an agreement (which was assented to by the debtor) to accept payment by his covenanting to pay two-thirds of his annual income to a trustee of their nomination, and give a warrant of attorney as a collateral security. The creditors never nominated a trustee, and the agreement was not acted upon, and one of the creditors brought an action against the debtor for his demand. The debtor appeared to have been always willing to perform his part of the engagement: Held, that the agreement, though not properly an accord and satisfaction, was still a good defence on the general issue, as it constituted a valid new contract between the creditors and the debtor, capable of being immediately enforced, and the consideration for which to each creditor was the forbearance of the rest; and as there appeared no failure of performance on the part of the debtor. *Good v. Cheesman*, E. 1 W. 4. 328
2. B. and C. being jointly indebted to A., the latter sued B. alone. He remonstrated upon the hardship of the case, alluded to circumstances which would probably reduce the plaintiff's demand if he gained a verdict, and proposed to put an end to the action by paying part of the debt, and the costs of suit. This was agreed to, and a receipt given for the sum paid, which was stated to be for debt and costs in *that action*. A. afterwards sued C.: Held, that the composition above mentioned did not operate as a discharge of the whole debt, but only to relieve B., and therefore, it was no defence for C. *Watters v. Smith*, M. 2 W. 4. 889

CONDITION PRECEDENT.

See AGREEMENT, 1.

CONSIGNOR AND CONSIGNEE.

B., a merchant in England, in June and July 1880, sent orders for the purchase of corn, to the plaintiffs, in Russia, desiring them to draw upon H. and Co., in London, for the amount, and he chartered a ship belonging to the defendants, and sent it to Russia to be freighted. On the 28th of July B. wrote a letter, cancelling the orders he had given. Upon the 8th of August 1880 the plaintiffs informed B. that they had purchased a cargo for the ship, and should despatch it as soon as possible, addressed to H. and Co., London, expressing a hope that he would approve

of what they had done, notwithstanding his last-mentioned communication. The cargo was afterwards shipped, and the plaintiffs by letter informed B. that they had shipped it on his account, and that they had forwarded an *endorsed* bill of lading to H. and Co., drawing upon them for part of the price, and upon him (B.) for the residue; and they enclosed an *unendorsed* bill of lading to B. and an invoice of the wheat, in which it was stated to be bought for his order and on his account. The bills of exchange enclosed in this letter were dishonoured, whereupon the plaintiff's agent in London delivered the endorsed bill of lading to H. and Co. On the 2d of October B. confirmed the revocation of his order, and on the 24th of November the agent of the plaintiffs in England gave notice to the agent of B. that he should retain the whole of the wheat for the plaintiffs. B. afterwards became desirous of having the wheat, and the master of the vessel in which the wheat was shipped, delivered it to B.'s orders, and not to H. and Co., pursuant to the bill of lading.

In an action brought against the ship-owners for not delivering pursuant to the plaintiffs' orders it was contended, that the plaintiffs were entitled to recover nominal damages only, because the property in the wheat had actually vested in B. by the shipment: Held, however, that the property did not vest in B. absolutely upon the shipment, but only subject to a condition, that the bills were accepted, and that in default of acceptance, it never did vest in him; and that the plaintiffs, therefore, were entitled to recover the value of the wheat at the time when it was delivered to B.'s order. *Brandt and Another v. Bowlby and Another*, M. 2 W. 4. 932

CONTEMPT.

See COURT OF REQUESTS, 2.

CONTINUANCES.

See PROCEEDENDO, 1. STATUTE OF LIMITATIONS, 1.

CONVEYANCE.

See DEED, 1. STAMP, 3.

CONVICTION.

See PROCEEDENDO, 1.

COPYHOLD

See DEVISE, 3. STAMP, 3.

1. A copyhold estate was vested in fourteen trustees, by a decree of the Court of Chancery, made in a suit to which the lord of the manor and the trustees for the time being were parties, it was ordered, that when at any time the number of the trustees should be reduced to five, the lord should, with the approbation of

a Master in Chancery, nominate nine others to be added to the five, to whose use a new surrender should be made, and that the lord should admit them on paying a reasonable fine. The annual value of the estate was 1000l.:

Held, that 5657l. 19s. was an unreasonable fine on the admission of fourteen trustees; and that the proper mode of assessing the fine was to take, for the first life, two years' improved value; for the second life, one half of the sum taken for the first; and for the third life, one half of the sum taken for the second; and so on. *Wilson v. Hoare*, E. 1 W. 4. 850

2. In copyhold lands, although the property in mines be in the lord, the possession of them is in the tenant. The latter, therefore, may maintain trespass against the owner of an adjoining colliery, for breaking and entering the subsoil and taking coal therein, although no trespass be committed on the surface. *Lewis v. Branthwaite*, E. 1 W. 4. 437

CORPORATION.

1. The Court will not grant an application by members of a corporate body, for a mandamus to inspect the documents of the corporation, unless it be shown that such inspection is necessary with reference to some specific dispute or question depending, in which the parties applying are interested; and the inspection will then only be granted to such extent as may be necessary for the particular occasion.

Where members of a corporation, merely alleging grounds on which they believed that its affairs were improperly conducted, and the officers unduly chosen, and complaining of misgovernment in some particular instances not affecting the parties themselves, or any matter then in dispute, applied for a mandamus to the master and wardens to allow them to inspect and take copies of all records, books, and muniments in the possession of the master and wardens, belonging to the company or relating to its affairs, the Court discharged the rule with costs. *The King v. The Master and Wardens of the Merchant Tailors' Company*, E. 1 W. 4. 115

2. Guardians and directors of the poor were incorporated by statute, and were thereby ordered to hold certain courts and meetings, at which any rate payer might object to their proceedings or accounts, and such objection should be taken into consideration; and if the matter could not at that time be settled to the satisfaction of the complaining party, it should be adjourned to the next court, to be there finally heard and determined.

A subsequent clause provided, that any

person aggrieved by anything done in pursuance of the act, and for which no particular method of relief was already appointed, might appeal to the quarter sessions to be holden within four calendar months next after the cause of complaint should have arisen.

A rate payer appealed to the sessions against an order of the directors for the payment of sums due on annuities, and as interest on loans. The order had been made less than four months back, but the debts had not been incurred, nor the annuities granted within four months: Held, that the appeal was not barred by the first-mentioned clause of the act, and that the cause of complaint had arisen within four months. *The King v. The Justices of Salop*, E. 1 W. 4. 145

- 3 The common council of the city of London have by custom a right to make ordinances for regulating carts worked within the city for hire, restraining their number, licensing them, and regulating the manner in which they shall be licensed. A by-law was made in common council, that 420 of such carts, and no more, should by the president and governors of Christ's Hospital, be allowed or licensed to work for hire within the city;

Held, that such by-law was supported by the custom; and that the discretionary power of licensing was rightly and ex necessitate delegated by the common council to a smaller body. And (on motion for a procedendo, after return to a habeas corpus, obtained by a party sued on the by-law, this Court refused to inquire whether or not the number of 420 was reasonable. *Sir James Shaw, Bart., v. Pope*, T. 1 W. 4. 465

- 4 By charter, the company of Patten makers were made a corporation, having a master, two wardens, and twelve assistants, and the company were to elect yearly one of the two wardens to be master.

By a by-law afterwards made and agreed to by the whole company, the master was from thenceforth to be elected by the master, wardens, and assistants for the time being in a particular mode (not prescribed by the charter) out of two or three meet and sufficient persons, being of the number of the master, wardens, and assistants, and selected by the master and wardens. In case of an equality of voices the master was to have a double vote: Held, that the by-law was bad, because it extended the number of persons eligible by the charter to the office of master: and (per PARKER, J.) semble that it was also bad because the election was required to be in a particular mode not prescribed or sanctioned by the charter. *The King v. Bumstead*, T. 1 W. 4. 699

- 5 By an act, 42 G. 3, c. 56, for enlarging the poor-house of the parish of Chatham,

certain persons therein named and their successors, were appointed guardians of the poor in C., and trustees for putting the act in execution; and in order that there might be an impartial succession of guardians and to keep up the specified number, it was provided, that eight should go out of office yearly, and that the parishioners should re-elect the same persons, or other inhabitants of the parish in their stead. By other sections the guardians were empowered to raise money by mortgage or grant of annuity, to purchase land, and to take a conveyance to themselves and their successors: and they were to sue and be sued in the name of their treasurer for the time being, who was to be reimbursed by the guardians all costs and damages to which he should be put as plaintiff or defendant in such action.

A. was treasurer to the said guardians under the provisions of the act from 1805 till 1811, and from 1811 to 1828.

By a decree of the Court of Chancery in 1808, the parish of C. was adjudged to be entitled in respect of such part of it as was within the city of Rochester, to two thirty-second parts of certain revenues bequeathed for the use of the poor of that city, and a sum of 1115*l.* was paid over to A. as such treasurer, on that account. That sum he, by order of the then guardians, paid over to them in 1822, and they applied it to the use of the poor of the whole parish. On the petition of the inhabitants of that part of the parish which was within the city of Rochester, the plaintiff, after he ceased to be treasurer, was ordered by the Court of Chancery to pay the above-mentioned sum which he had received as treasurer, into Court, in order that it might be applied to the exclusive use of Chatham *extra*. He accordingly paid the amount, and brought an action against the guardians to recover it:

Held, that the guardians were, for the purposes of suing or being sued, in the nature of a corporation, and that A. was entitled to recover in an action against the now treasurer the sum paid by him into the Court of Chancery, as money paid to the use of the guardians. *Jeffreys, Gent., One, &c., v. Gurr*, M. 2 W. 4. 833

COSTS.

See BANKRUPT, 2, 7. CERTIORARI, 1. HIGHWAY ACT, 1. MANDAMUS, 3. PRACTICE, 7.

1. Trespass for breaking and entering the plaintiff's close, and treading down the grass, &c. Plea, first, not guilty; secondly, a right of way. Replication, joined issue on plea of not guilty, traversed the right of way, and also new assigned, that the plaintiff committed the trespass on other and different occasions, and for other and different purposes than those

mentioned in that plea. The defendant joined issue on the right of way, and suffered judgment by default, as to the new assignment. The jury having found a verdict for the defendants on the issue on the special plea, and assessed the plaintiff's damages at 1s. on the new assignment: Held, that the defendants, not having withdrawn the general issue, were not entitled to the general costs of the trial. *Broadbent v. Shaw and Others*, M. 2 W. 4. 940

2. The statute 12 Car. 2, st. 2, c. 2, s. 10, giving double costs on affirmance of a judgment upon writ of error, was held not to apply where the party about to sue out such writ had, in order to avoid execution, paid the damages and costs to the opposite attorney, with a notice to retain them in his hands; and the attorney had deposited the sum in a bank where it produced interest. *Wright v. Fairfield and Others*, M. 2 W. 4. 959

COURT OF DELEGATES.

On an appeal to His Majesty's Court of Delegates against a decree of the Prerogative Court, a commission issued to certain persons to hear and determine such appeal; and it was commanded, that in acts to be done in the said appeal before giving a definite sentence therein, two at least of the delegates, but in the pronouncing a definite sentence therein, three at least, should be present and consenting, as well in the appeal as in matters of attentates, &c., done since, and in prejudice thereof, and likewise in the principal cause, together with its incidents, emergents, dependents, and things enjoined and connected thereto whatsoever. The appellant was condemned in costs, and two monitions were successively decreed, the first by three, the second by two only, of the delegates, to enforce judgment. These being disobeyed, three of the delegates pronounced the appellant in contempt for non-payment of costs, after which a significavit, pursuant to 58 G. 3, c. 127, s. 1, was issued by two only of the delegates.

The Court held the significavit to be void, and quashed the writ de contumace capiendo issued in pursuance of it. *The King v. Blake*, E. 1 W. 4. 139

COURT OF REQUESTS.

1. Plaintiff had a demand on defendant for 9l., and owed defendant 21l. on a promissory note. They agreed to set off the smaller sum against the larger. Defendant afterwards sued plaintiff on the note in the Spalding court of requests for 5l. (the highest sum demandable there), and recovered: Held, that defendant had not thereby waived the agreement, and become liable again for the 9l., though the recovery was in respect of the

whole debt on the note, and the local court could not take cognisance of the balance of an account. *Penney v. Squier*, E. 1 W. 4. 142

2. In an action of trespass against commissioners of a court of requests and their officer for taking goods, the defendants justified, alleging, that at the court holden by them pursuant to statute, the plaintiff committed a contempt, and thereupon the defendants who were commissioners imposed a fine upon him, and issued their warrant to the other defendant, the officer, to levy it, by virtue of which he seized, &c. It was proved that the commissioners were acting in their jurisdiction, that a conviction and warrant produced were signed by them, and that the other defendant was their officer; and in proof of the contempt and proceedings thereupon, the conviction of the plaintiff, and the warrant to levy the fine were put in: Held, that although the pleas stated as a substantive fact that the plaintiff had been guilty of a contempt, and not merely that he had been convicted, the fact of contempt could not be inquired into; for the allegation of it might be rejected as unnecessary, and the conviction and warrant were pleaded, and these, appearing to have issued from a competent jurisdiction, were conclusive of the facts stated in them.

The act empowered the commissioners to fine any person who should contemptuously and wilfully insult or abuse them. One of the pleas stated, that the plaintiff contemptuously, &c., insulted the commissioners by accusing them of injustice; the conviction stated this in similar terms, but added, "and by calling Mr. G. S., who was then attending in the court, an infamous liar:" Held, no variance, as the latter statement might be rejected.

The statute provided, that it should be lawful for the serjeant, by order of the court, to apprehend the person guilty of contempt, and that the court should then proceed to fine, &c. The conviction merely stated that the plaintiff was apprehended; but it appearing by the narrative that the apprehension must have been in presence of the commissioners, who afterwards proceeded to fine: Held, that their order might be inferred.

The court was, by the statute, to be holden only on Tuesdays. The warrant was headed as if made at a court holden on that day, when the fine was in fact imposed; but it purported to be signed and sealed on the next day: Held, no objection. *Alridge v. Haines and several Others*, E. 1 W. 4. 395

COVENANT.

See BANKRUPT, 5.

1. By indenture, in the form, and containing the usual covenants, of a lease, A.

demised premises to B., and B. and C. covenanted to pay the rent; but C. was not otherwise referred to in the instrument. In an action against C., on a covenant to pay rent: Held, that the indenture was available against him, though stamped as a lease only, and that a deed stamp was unnecessary. *Price v. Thomas*, E. 1 W. 4. 218

2. Defendant, by a settlement made on his marriage, conveyed estates upon certain trusts, and covenanted with the trustees to pay off encumbrances on the estates, to the amount of 19,000*l.* within a year: Held, that on his failing to do so, the trustees were entitled to recover the whole 19,000*l.* in an action of covenant, though no special damage was laid or proved; and an inquisition, on which nominal damages had been given, was set aside, and a new writ of inquiry awarded. *Lethbridge v. Mytton*, T. 1 W. 4. 772

3. By an indenture between A. and B. and his wife, and C., of one part, and D. and E. and the same C., of another part, it was recited, that F., also party to the deed, had requested to have a certain farm given up to him, in which B.'s wife was interested, he, F., giving sureties, namely, the said D., E., and C., for payment of an annuity to B.'s wife; and it was thereupon witnessed that, in consideration of the covenants thereafter entered into by A., B. and his wife, and C. and of 10*s.*, the said D., E., and C., and each and every of them, covenanted with A., B. and his wife and C. to pay the annuity. There followed covenants by A., B. for himself and his wife, and C., severally, for quiet enjoyment, and for executing an assignment to F. when required. The deed was signed and sealed by D., E., and C., and by F., but not by A. or B. In an action brought by A. and B. after the death of C. for breach of the covenant to pay the annuity: Held, first, that the omission of A. and B. to execute the deed did not disable them from suing upon it; that such omission did not amount to a total failure of consideration for the covenant sued upon (supposing such total failure to be an answer to the action), and that the covenant to pay the annuity, and those for quiet enjoyment and for assigning, were not mutual and dependent.

Secondly, that at least after C.'s death, A. and B. might sue D.'s executors (D. and E. being also dead) for non-payment of the annuity, though the covenant for such payment was entered into both by B. and to C. *Ross v. Poulton and Others*, M. 2 W. 4. 822

CRIMINAL INFORMATION.

See INFORMATION.

CUSTOM.

1. The Court will grant a mandamus to the inhabitants of a parish liable to contribute to the church rate, to meet and assemble together with the minister, to elect churchwardens.

The return to such a mandamus stated an immemorial custom in the parish to have no churchwarden, and that the duties appertaining by law to the office of churchwardens had been from time out of mind discharged by the overseers of the poor: Held, that inasmuch as overseers had not existed time out of mind, and as there were necessary duties appertaining to churchwardens, and there must have been some persons bound by law to discharge those duties, the custom set out in the return was bad.

The operation of the statute 1 W. 4, c. 21, s. 6 (authorizing the Court at their discretion to grant the costs of application for mandamus, and of the writ, if issued and obeyed), is confined to cases where the application was originally made after the act came in force. *The King v. The Inhabitants of Wix*, E. 1 W. 4. 197

2. The common council of the city of London have by custom a right to make ordinances for regulating carts worked within the city for hire, restraining their number, licensing them, and regulating the manner in which they shall be licensed. A by-law was made in common council, that 420 of such carts, and no more, should by the president and governors of Christ's Hospital, be allowed or licensed to work for hire within the city;

Held, that such by-law was supported by the custom; and that the discretionary power of licensing was rightly and ex necessitate delegated by the common council to a smaller body. And (on motion for a procedendo, after return to a habeas corpus, obtained by a party sued on the by-law) this Court refused to inquire whether or not the number of 420 was reasonable. *Sir James Shaw, Bart., v. Pope*, T. 1 W. 4. 465

DAMAGES.

See BANKRUPT, 5, 6. COVENANT, 1. ATTORNEY, 1.

DEBT.

See ARBITRAMENT, 4.

DEBTOR AND CREDITOR.

See COMPOSITION DEED.

DEED.

See ESTOPPEL, 1. MORTGAGOR AND MORTGAGEE, 5.

1. A pauper, being in custody for having left his wife and children chargeable to a parish for several years, executed an indenture, reciting "that the present, as well as former parish officers, had expended 17*l.* in maintaining his wife and

children, and that he had agreed to convey to the parish officers certain lands, &c.:" and he thereby conveyed the same to trustees for the churchwardens and overseers of the poor, and of the inhabitants of the parish, to the intent that the rents and profits might be applied to their use and benefit in aid of the poor rate: Held, that this was a conveyance for the benefit of a charitable use, requiring enrolment pursuant to the statute 9 G. 2, c. 36, s. 1, and not a conveyance for a valuable consideration actually paid, within s. 2 of that act: and that a person who had been a party to the deed conveying the property, was not estopped from taking advantage of this objection. *Doe d. Preece v. Howells*, T. 1 W. 4. 744

DEPOSIT.

See ANNUITY, 2.

DEPUTY.

See MANDAMUS, 2.

DESCENT.

See DEVISE, 2.

DEVISE.

See EVIDENCE, 16.

1. Testator devised all his share of his two estates in W. to his daughter E. B. for life, and at her decease to J. B., her husband, during his life; and at the decease of his said son-in-law J. B. he directed that the whole legacy to him should go to his grandson W. B. and to his children lawfully begotten, for ever; but in default of such issue at his decease to the testator's grandson A. B., his heirs and assigns for ever: Held, that W. B. took an estate tail in the shares of the estates in W. *Broadhurst v. Morris*, E. 1 W. 4. 1

2. Testator devised estates to his son R. H., his heirs and assigns for ever, subject nevertheless to the payment of 250*l.*, 200*l.*, and 150*l.*, to the testator's three daughters respectively. He then continued, "And I do hereby direct, that until my said son Richard or his heirs shall come to England, and also to pay to my said three daughters the sum of 600*l.*, in manner as aforesaid, he shall not have possession of the said estate. But the rents and profits arising from the said estate and premises shall be equally divided to and amongst my said three daughters in equal parts and proportions, until my said son or his heirs shall come to England and pay the said sum of 600*l.*, as aforesaid." He further empowered the eldest daughter to let the premises from time to time, for terms of seven years; and he added, "And in case my said son shall not come to England during his lifetime to take possession of the said estate in manner hereinbefore mentioned, and shall die without leaving any issue lawfully to be begotten, then I give and devise the said estate and

premises to my said three daughters in equal parts and proportions, not as joint tenants but as tenants in common, and to the respective heirs of their several bodies for ever." If either of the younger daughters died under age and unmarried, her moneys, estate, &c., were to be divided equally between the survivors.

On the testator's death the daughters entered, R. H. the son being abroad, and they kept possession till he died, never having made the required payment: Held, that their estate in the premises was either a fee, conditioned to determine when R. H. "or his heirs," should fulfil the terms of the will, or a chattel interest, subject to the same event. *Doe dem. Goldin v. Lakeman and Others*, E. 1 W. 4. 80

3. A testator being seised in fee of freehold land, and of copyhold according to the custom of the manor (the freehold and copyhold being intermixed), devised as follows:—"As to my worldly estate, I dispose thereof as follows: I give to my nephew T. G. all my lands, to have and to hold during his life, and to his son if he has one, if not, to the eldest son of my nephew T. G. and to his son after him, if he has one, if not, to the regular male heir of the G. family." By codicil stating that his nephew T. G. had a son born, he gave to that son, after his father's decease, all his freehold and copyhold lands; and to his eldest son, if he had one; but if he had no son, then to the next eldest regular male heir of the G. family." By the custom of the manor, copyhold lands, parcel thereof, of which any tenant died seised in fee, passed by descent to the youngest son: Held, that by the will and codicil the son of T. G. took an estate tail, and that consequently upon his death the copyhold lands descended to the youngest son. *Doe dem. Garrod v. Garrod*, E. 1 W. 4. 87

4. Testator devised to trustees and their heirs, certain premises described in his will upon trust, to permit his daughter to enjoy the same, and take the rents during her life exclusive of her husband; and from and after her decease, upon trust to the use of such child or children, and for such estate as she, notwithstanding her coverture, should by any deed or will appoint; and for want of such appointment, then to the use of the heirs of her body; and for default of such issue, to his own right heirs for ever. Then, after devising several other lands to the trustees in the like terms, he concluded thus: "And I hereby will that the said trustees, and each of them, shall, may, and do, in every respect, give receipts, pay money, and demise the aforesaid premises, or any part thereof, as shall be consistent with their duty and trust, or otherwise:" Held, that the trustees took a fee simple in the lands devised to them. *Doe dem. Keen v. Walbank*, T. 1 W. 4. 554

- 5 Testator devised all his lands, &c., unto and to the use of trustees, their heirs and assigns for ever, upon trust to pay the rents and profits to the separate use of his eldest daughter for life, and after her decease, upon trust to convey the same to the use of such person, and for such estates, as she in and by her last will in writing should appoint, and in default of such appointment, to the use of her right heirs: Held, that the trustees took an estate in fee simple in the lands devised. *Doe dem. Booth v. Field*, T. 1 W. 4. 564
6. Devise to Margaret and Elizabeth, and the survivor of them, their heirs and executors for ever, gives a joint tenancy in fee, and not estates for life with remainder in fee to the survivor. *Doe dem. Young v. Southeron*, T. 8 W. 4. 628

DISTRESS.

By an instrument not under seal, A. agreed to let to B. on lease the rectory of L., and the tithes arising from the lands in the parish of L., and also a messuage used as a homestead for collecting the tithes, at the yearly rent of 200*l.* The rent being in arrear, A. distrained, and B. having brought trespass, it was held, that the distress was altogether unlawful, because the agreement not being under seal, did not operate as a demise of the tithes, and no distinct rent was reserved for the homestead. *Gardiner v. Williamson*, E. 1 W. 4. 386

DUTIES.

See METALS. PORT.

ECCLESIASTICAL BENEFICE.

See ANNUITY, 3.

EJECTMENT.

See EVIDENCE, 11. LANDLORD AND TENANT, 2.

1. By statute 11 G. 4, c. lxx., the Hungerford Market Company are empowered to purchase certain property, and the leases, &c., of premises on it; and the lessees and tenants for years or at will are to give up possession at three months' notice, but compensation is to be made to any such tenant required to quit before the expiration of his term. Sect. 19 provides, that all tenants for years, from year to year, or at will, "who shall sustain any loss, damage, or injury in respect of any interest whatsoever for good-will, improvements, tenant's fixtures, or otherwise, which they now enjoy, by reason of the passing of this act," shall be entitled to compensation, to be assessed, if necessary, by a jury.

A tenant from year to year was ejected by the company, but received a regular half-year's notice to quit. It appeared that she had been many years in possession; and that the tenancy was not likely to have been determined if the act had not passed: Held, that she was entitled to compensation for the whole marketable

interest which she had in the premises at the time when the act passed; and that the good-will of premises, though on so uncertain a tenure, was protected by the act as an interest which would, practically, have been valuable as between the tenant and a purchaser, though it was not a legal interest as against the landlord.

Otherwise, where the tenancy was from year to year, determinable at three months' notice ending with the year, and with a stipulation against underletting without leave.

In a case said to come within the protection of the act, where the company had brought ejectment, the Court refused to stay proceedings till compensation should be made, or a jury summoned. *Ex parte Farlow, in the Matter of the Hungerford Market Company*, E. 1 W. 4. 341

2. In ejectment by a mortgagee, the mere fact of his having received interest on the mortgage down to a time later than the day of the demise in the declaration, does not amount to a recognition by him that the mortgagor or his tenant was in lawful possession of the premises till the time when such interest was paid, and consequently is no defence to the ejectment. *Doe dem. Rogers and Wife v. Cadwalader*, T. 1 W. 4. 473

3. In 1772 a term of 1000 years was created by deed, for the purpose of securing a sum of 5000*l.*; and in 1787, the principal and interest having been paid, the residue of the term was assigned in trust, for the devisees of the person who created the term. In 1789 the premises were conveyed to a purchaser by deed, and the residue of the term was assigned in trust for the purchaser, her heirs and assigns, or as she should appoint, and in the mean time to attend the inheritance. The purchaser entered into possession of the premises, and continued so possessed till her death. In 1808 she executed a marriage settlement, reserving to herself a power of appointment by deed or will; and after the marriage, she in December 1813 devised all her real estate. Neither in the marriage settlement nor in the will was any mention made of the term of 1000 years. She and her husband having both died, it was held, on ejectment brought by her heir at law, that there were no premises from which surrender of the term could be presumed. *Doe d. Blackness v. Plowman*, T. 1 W. 4. 573

4. At the trial of an ejectment when there is no doubt as to the identity of the premises sought to be recovered, and those for which the tenant defends, the lessor of the plaintiff is not required to produce the consent rule. *Doe dem. Greaves v. Raby*, M. 2 W. 4. 948

EMANCIPATION.

See SETTLEMENT BY PARENTAGE.

ENLARGEMENT OF TIME.See **ARBITRAMENT**, 2.**ENROLMENT.**See **ANNUITY**, 1. **DEED**.**EQUITABLE INTEREST.**See **MORTGAGOR AND MORTGAGEE**.**ESCAPE.**See **EVIDENCE**, 18.**ESTATE OF INHERITANCE.**See **STAMP**, 8.**ESTATE TAIL.**See **DEVISE**, 1, 2.**ESTOPPEL.**See **DEED**.

1. A. having an equitable fee in certain lands, on the 21st of January, 1828, conveyed the same to B. by lease and release. The release recited, that A. was legally or equitably entitled to the premises conveyed; and the releasor covenanted, that he was and stood lawfully or equitably seised in his demesne of and in, and otherwise well entitled to the same. The legal estate was subsequently conveyed to A., and he afterwards for a valuable consideration conveyed the same to C. Upon ejectment brought by B. against C.:

Held, first, that there being in the release no certain and precise averment of any seisin in A., but only a recital and covenant that he was legally or equitably entitled, C. was not thereby estopped from setting up the legal estate acquired by him, after the execution of the release.

Held, 2dly, that the release did not operate as an estoppel by virtue of the words, "granted, bargained, sold, aliened, remised, released," &c., because the release passed nothing but what the releasor had at the time, and A. had not the legal title in the premises at the time when the release was made.

Held, 3dly, that this case did not fall within the rule, that a mortgagor cannot dispute the title of his mortgagee, because C. claimed as a purchaser for a valuable consideration without notice, a legal interest which was not in A. at the time of the mortgage to B.; A. had then only an equitable interest, which passed to B., whose title as to that was not disputed. *Right, on the demise of Jefferys, v. Bucknell*, E. 1 W. 4. 278

2. A company were empowered by act of parliament to carry on certain works, and the committee were authorized to make calls for money upon the proprietors, not exceeding 10% per share, from time to time as they should find necessary, so

that no calls should be made at the intervals of less than two months from each other. None of the powers of the act were to be put in force till 83,500% were subscribed. The committee began the works before that sum was subscribed, and made a single order, calling on the proprietors for several payments of 10% each, to be made at intervals of two months.

A subsequent act recited, that the capital of 83,500% had not been subscribed; that the company had proceeded in the works, incurred debts, &c., and that a certain sum was due from defaulters in the payment of calls. It provided for carrying on the works, and for making further calls; and it enacted, that the powers, &c., of the former act (except where expressly altered) should remain vested in the company, though the 83,500% had not been subscribed.

In an action by the company against one of the committee for money due on some of the calls made as above mentioned, others of which he had paid: Held, that the calls, being made all at one time, were irregular; that they were not ratified by the mention of them in the second statute, as it could not be presumed, in the absence of any expression to such effect, that the legislature, when passing that act, was apprised of their having been improperly made; and that the defendant was not estopped by having joined in making the calls or by his payment of part of them, from disputing their validity; for that, the calls being against law, no person could complain of having been misled into a compliance with them by the defendant's conduct or admissions. *The Stratford and Moreton Railway Company v. Stratton*, T. 1 W. 4. 518

3. An obligor sued on a bond reciting a certain consideration, is estopped from pleading that the consideration was different, unless he can make it appear by his plea that the whole transaction was fraudulent or unlawful. *Hill v. The Proprietors of the Manchester and Salford Water Works*, T. 1 W. 4. 544

EXECUTION.See **PROCEDENDO**, 1. **BANKRUPT**, 1. **ARBITRAMENT**, 2.**EVIDENCE.**See **INDICTMENT**, 2. **ANNUITY**, 2.

1. The plaintiff declared in trespass for breaking his close, and set out the close by abutments. The defendant justified, alleging that the said close in which, &c., was part of an allotment of six acres made by commissioners duly authorized, for certain purposes, in execution of

which he entered. Plaintiff denied that the said close in which, &c., was part of the six acres in the plea supposed to have been allotted: and thereupon issue was joined. It appeared that the close set out by abuttals was not all within the allotment, but that the part in which the actual trespass occurred was within it: Held, that the justification was made out. *Bassett v. Mitchell and Smith*, E. 1 W. 4. 99

2. Plaintiffs agreed to purchase of defendants "about 800 quarters, more or less," of foreign rye shipped on board the A. E. at Hamburg, at a certain price, subject to the vessel's safe arrival with the goods on board, and being unsold at Hamburg. The ship brought 850 quarters, and defendants refused to deliver any part unless the plaintiffs would accept the whole. The plaintiffs abandoned the contract, and brought an action to recover back a sum of money which they had paid for 800 quarters: Held, by Lord Tenterden, C. J., and Littledale, J., that by the words "about," and "more or less," the parties could not be taken to have contemplated so large an excess as fifty over 800 quarters; by Parke, J., and Patteson, J., that at all events it lay on the defendants to show that such an excess above the quantity named was in contemplation; and if from the obscurity of the contract they were unable to do so, their defence failed.

Semle, that evidence of mercantile men as to the effect of the words "about," and "more or less," in such a contract, was not admissible. *Cross and Another v. Eglin and Another*, E. 1 W. 4. 106

3. In an action against a coach proprietor for negligence, it appeared that the plaintiff's leg was thereby broken in the county of O., where she remained some time; but before she was fully recovered she removed to the county of W., where medical attendance became necessary, and expense was consequently incurred.

Held that the inconvenience suffered, and expense incurred, by the plaintiff in the county of W., was *material evidence of a matter in issue* arising there, within the meaning of the undertaking given by the plaintiff, in answer to a motion to change the venue. *Curtis and Wife v. Drinkwater*, E. 1 W. 4. 169

4. A farmer and grazier had frequently, before September 1825, when the new bankrupt act, 6 G. 4, c. 16, came into operation, and in some few instances after, purchased cattle with a view to resale, and not for the purpose of his farm. A commission of bankrupt having issued against him after September 1825, it was held in an action brought to try the validity of the commission, that the acts of buying before that period were admissible in evidence to explain the quality of the subsequent acts.

The forty-fourth section of the 6 G. 4, c. 16, does not entitle assignees of a bankrupt, on a verdict found for them, to double costs: and where one of the defendants was in fact the messenger under the commission, but it was not proved or admitted at the trial that he acted under a warrant from the commissioners; it was held, that he must be taken to have acted in aid of the assignees only, and, therefore, that he was not entitled to double costs. *Worth and Another v. Budd*, E. 1 W. 4. 172

5. On appeal against an order of removal, the appellants, to show that the pauper served more than forty days as an apprentice in the respondent parish, with the assent of his master, produced a written paper, purporting to certify that the father of the pauper agreed to give his master eight shillings for the term of his apprenticeship: Held, that, there being nothing to show that the value of the subject-matter of the agreement was 20*l.*, it did not require a stamp. *The King v. The Inhabitants of Enderby*, E. 1 W. 4. 205

6. In assumpsit on the warranty of a horse, the consideration stated for the warranty was, that the plaintiff would purchase the horse for 63*l.*; but the consideration, as proved, was, that the plaintiff would pay that sum, and, if the horse was lucky, would give the defendant 5*l.* more, or the buying of another horse: Held no variance, the conditional promise omitted in the declaration being too vague to be legally enforced, and not amounting, in point of law, to a promise. *Guthing v. Lynn*, E. 1 W. 4. 232

7. A person who pays the highway rate within a parish, is not rendered a competent witness by the 54 G. 3, c. 170, s. 9, upon the trial of an issue, whether, within that parish, there was a custom that all persons residing therein, whose duty it is to cause the highways within the parish to be repaired, may take shingle from the sea-beach for the purpose of such repair; the custom not being a matter relating to rates or cesses within the meaning of the act. *Oxenden, Bart., v. Palmer*, E. 1 W. 4. 236

8. Upon the trial of an issue in prohibition, whether the usurpation of office in a quo warranto information mentioned was committed out of the jurisdiction of the county palatine, and within that of the city, of Chester; a document from the remembrancer's office of the Court of Exchequer was produced, purporting to be a decree made (after hearing of a complaint made against the citizens of Chester, and their answer) by the Lord High Treasurer of England, the Chancellor of the Exchequer, the Chief Baron, and the under-treasurer, with the advice and assent of a queen's serjeant, and the Queen's Attorney and Solicitor General,

- and others of the same court: Held, that this document was not admissible in evidence as a decree, because it was not a decree of the Court of Exchequer nor of any court known to the law at the time when it purported to have been made; nor as an award, because there appeared no voluntary submission of parties; nor as evidence of reputation, because the parties making the decree had no knowledge of the subject, except that which they derived in the course of the proceeding. *Rogers v. Wood and Another*, E. 1 W. 4. 245
9. A tenement consisting of a dwelling-house and thirty-two acres of land was, since the 6 G. 4, c. 57, hired, and occupied, for a year, at an annual rent of 20*l.* and a year's rent paid. Twenty-seven acres of the land were situate in the township of N., and five acres within that of P.: Held, that evidence was admissible, to show how much of the entire annual rent of 20*l.* was paid in respect of the land in N. *The King v. The Inhabitants of Pickering*, E. 1 W. 4. 267
10. On the trial of an action at law, a copy of a letter referred to by the plaintiff in his answer to a bill in Chancery, the original of which, instead of being filed in the Master's office, had, by consent of the parties, been deposited for inspection with the plaintiff's clerk in court, is admissible in evidence on the part of the defendant, without reading the answer in Chancery. *Long v. Champion*, E. 1 W. 4. 284
11. A person who has purchased a horse warranted sound, sold it again, and then re-purchased it, cannot, on discovering that the horse was unsound when first sold, require the original vendor to take it back again; nor can he by reason of the unsoundness, resist an action by such vendor for the price. But he may give the breach of warranty in evidence in reduction of damages. *Street v. Blay*, T. 1 W. 4. 456
12. The servant of a party who had been bargaining for the purchase of a chattel, came to the owner and said that his master desired to look at it, and would keep it if approved of. The chattel was in consequence delivered to the servant, but was neither purchased nor returned. Trover was brought against the servant: Held, that the master was a competent witness to prove in defence, that the message had been delivered by his authority, and the chattel received and kept by him. *Grylls v. Davis*, T. 1 W. 4. 514
13. It is a good defence to an action against a sheriff or gaoler for an escape, that he discharged the prisoner from custody by virtue of an order of the insolvent debtors' court; he need not show that the proceedings upon which the order is grounded were properly taken, or that the insolvent was within the walls of a prison when he petitioned for his discharge. *Suffery v. Jones*, T. 1 W. 4. 598
14. Upon a question as to the settlement of Elizabeth, the wife of C., the respondents proved by the testimony of C. his marriage with the pauper in 1829. The appellants, in order to prove that that marriage was void, on the ground that he had been married in 1826 to M. B., called the latter, who stated that she in 1826 went with C. before a reputed clergyman of the established church, in Ireland, who, in his private house, there read to them the marriage ceremony. A document was also produced, purporting to be W.'s letter of orders, signed in 1799, by the then Archbishop of Tuam, which was proved to have been among W.'s papers at the time of his death in July 1829.
- Held, first, that M. B. was a competent witness to prove the first marriage, although her husband had been before examined, and proved the second marriage.
- Secondly, That the certificate of the ordination of W. was properly received in evidence, having come from the proper custody, and being more than thirty years old; and that, the certificate not being the act of any court, and not having any relation to the corporate character of the Archbishop, the seal was to be considered the seal of the natural person, and not of the corporation. Had it been of the latter character, *Quære*, whether it would have been admissible, without evidence that it was the proper seal? *The King v. The Inhabitants of Bathwick*, T. 1 W. 4. 689
15. In an action for maliciously suing out a commission of bankrupt, it must be averred and proved that the commission was superseded before the commencement of the action: and if this fact be not proved, the plaintiff ought to be nonsuited, though it was not averred in the declaration, and though the defendant, who might have demurred for the omission, had not done so. *Whitworth v. Hall*, T. 1 W. 4. 695
16. Edward Gore, by his will, made in February 1801, devised all his manor, or reputed manor of Barrow Minchin, in the county of Somerset, with the mansion-house called Barrow Court, thereunto belonging, and the park, and also all his freehold messuages, lands, tenements, and hereditaments *thereunto belonging*, statute in the parish of Barrow Minchin and Barrow Gurney to trustees to the use of his eldest son W. G. Langton, for twenty years from the day of the testator's death, and after the determination of that estate, to the use of the first and other sons of the testator's younger son, Charles Gore, in tail male; remainder to testator's grandson J. G. Langton, and his sons in tail male: and he directed that the persons so taking these estates in tail male, should assume and use the name of Gore. He then dis-

posed of other parts of his real property situate in various counties, and, among other legacies, he bequeathed to his executors all arrears of rent due *from any tenants of his estates in the parish of Barrow*, to be laid out upon the farms, &c., appurtenant thereto; and he charged his *said estate at Barrow* with certain annuities. He bequeathed the residue of his personal property to his son Charles Gore. It appeared manifestly from the whole of the will, that his intention was to dispose thereby of all his real estate. The testator died in March 1801.

The estate and manor of Barrow had been in the testator's family for several generations. In October 1800 he purchased a farm and premises, which adjoined to and were in some parts intermixed with the Barrow estate, and which were situate in the parish of Barrow Minchin and Barrow Gurney. That parish contained two hamlets, Barrow Minchin and Barrow Gurney.

The manor of Barrow Minchin was a reputed manor, without courts, quits-rents, or freehold tenants. It extended beyond the hamlet of the same name, and comprised lands in the other hamlet. The gamekeeper of the manor of Barrow Minchin had been in the habit of shooting over the lands in question for several years before and after they were purchased by the testator, both in the time of the testator and of the defendant.

The testator, upon the marriage of his eldest son, had settled upon him considerable estates at a distance from Barrow Court. The son acquired also property by his wife, whose name (Langton) he took; and upon his marriage he fixed his residence upon one of the estates so acquired, at a distance from Barrow Court.

On ejectment brought by M. G., son of Charles Gore, the second son of the testator, to recover the farm and premises purchased by the testator in October 1800: Held (on a special case submitted to the Court), first, that the date of the purchases; the situation of the lands in question, the fact of William Gore Langton being eldest son of the testator, and having married a lady of fortune, and taken her surname; and that the ancient seat of the Gore family was at Barrow, the eldest son residing at another place, were admissible in evidence to explain the intention of the testator.

Held, secondly, that as the intention of the testator appeared manifest from the whole of the will (if the words "thereunto belonging" had not been in it), that the lands in question should pass as part of his Barrow estate, and as a jury might have inferred from the fact of the gamekeeper of the manor having shot over the lands in question, that they were within the limits, and part of, the manor; and it was left to the Court to draw such con-

clusions as a jury might have drawn, the words *thereunto belonging* might be understood to mean, in a popular sense at least, "situate within the manor;" and, consequently, that the land in question passed by the will. *Doe dem. Gore v. Langton*, T. 1 W. 4. 680

17. A., being taken before a justice of peace to be bailed, the defendant's attorney objected that the justice had no power to bail him. A letter, proved to have been written by a judge's clerk, purporting to be by authority of the judge, but without proof of such authority, was given in evidence for the purpose of showing that the justice was induced by such letter to bail A.: Held, that the letter was admissible for that purpose. An affidavit made by the attorney's clerk was put in, as showing that those who conducted the prosecution had taken means to prevent a person becoming bail for A. This was held to be admissible, without calling the clerk to prove an authority from his master to make the affidavit. *Taylor v. Williams (in error)*, M. 2 W. 4. 845

18. By the 6 G. 4, c. 94, s. 2, "any person intrusted with and in possession of any bill of lading, India warrant, &c., shall be deemed the true owner of the goods, &c., therein described, so far as to give validity to any contract entered into by such person for the sale of the said goods, or for the deposit or pledge thereof, as a security for any money or negotiable instrument advanced or given upon the faith of such documents." A., the owner of certain East India indigo warrants, intrusted them to a broker, without any authority to pledge or sell. The broker pledged them to B. In an action brought by A. against B. for the proceeds of the goods, the broker being called as a witness for the plaintiff, stated that he parted with the warrants to the defendant under a contract which was in writing: Held, that a defendant seeking to avail himself of the statute, must prove his contract with the broker, and consequently, that it was incumbent on B. to produce the written agreement. *Evans v. Truman and Others*, M. 2 W. 4. 886

19. At the trial of an ejectment where there is no doubt as to the identity of the premises sought to be recovered, and those for which the tenant defends, the lessor of the plaintiff is not required to produce the consent rule. *Doe dem. Greaves v. Raby*, M. 2 W. 4. 948

EXECUTOR.

See PRACTICE, 11.

1. The administrator of a husband who survived his wife, and died without taking out administration of her effects, cannot recover her choses in action. For that purpose administration must be taken out

- to the wife. *Batts, Administrator, v. Kimpton*, E. 1 W. 4. 278
2. An executor de son tort may, after action brought by a simple contract creditor, pay a specialty debt, and plead the payment of that debt in bar of action. *Oxenham, Gent., One, &c., v. Clapp, Executrix*, E. 1 W. 4. 309

EXECUTORY CONTRACT.

See **VENDOR AND VENDEE**, 6.

FARMER.

See **BANKRUPT**, 2.

FEE.

See **DEVISE**, 2, 4, 5.

FEME COVERT.

See **ASSUMPSIT**, 3.

FINE.

See **STAMP**, 3.

1. A copyhold estate was vested in fourteen trustees, and by a decree of the Court of Chancery, made in a suit to which the lord of the manor and the trustees for the time being were parties, it was ordered, that when at any time the number of the trustees should be reduced to five, the lord should, with the approbation of a Master in Chancery, nominate nine others to be added to the five, to whose use a new surrender should be made, and that the lord should admit them on paying a reasonable fine. The annual value of the estate was 1000*l*.:

Held, that 5657*l*. 19*s*. was an unreasonable fine.

Semble, that a fine on the admission of a number of joint tenants ought never to exceed four years' improved value, and that the proper mode of assessing the fine in the first instance is to take for the first life, two years' improved value; for the second life, one half of the sum taken for the first; and for the third life, one half of the sum taken for the second; and so on. *Wilson, Bart., v. Hoare*, E. 1 W. 4. 350

2. A fine was levied of thirty messuages, forty cottages, and four acres of land. In the deed to lead the uses, the premises were described as a piece of ground containing so many feet in length and in breadth; and "all those several messuages, dwelling-houses, tenements, warehouses, shops, coach-houses, and all and singular erections and buildings whatsoever, erected and built upon" the said piece of ground. When the fine was levied there were on the piece of ground two or three cottages and forty-nine dwelling-houses; and there was the same number of each when the ejectment was afterwards brought for the premises on behalf of parties claiming by virtue of the fine:

Held, that as the whole number of

buildings claimed did not exceed the number of the messuages and cottages named in the fine, and the intention evidently was that all should pass, the title of the lessors of the plaintiff was well sustained by such fine.

A fine may be levied of a cottage, so nomine, and a messuage will pass by that name. *Doe dem. of Young v. Southeron*, T. 1 W. 4. 628

FLY-BOAT.

See **TRESPASS**.

FOOT-PATH.

See **RATE**, 1.

FOREIGN JUDGMENT.

See **BILL OF EXCHANGE**, 10.

In order to render a foreign judgment void, on the ground that it is contrary to the law of the country where it was given, it must appear clearly and unequivocally to be so. Where the law of a foreign country required, that in a suit instituted against an absent party the proceedings should be served upon the King's Attorney-General; but it was not provided that the Attorney-General should communicate with the absent party: Held, that such law was not so contrary to natural justice, as to render void a judgment obtained against a party who had resided within the jurisdiction of the Court at the time when the cause of action accrued, but had withdrawn himself before the proceedings were commenced. *Bacquet and Others v. Mary Mac Carthy, &c.*, M. 2 W. 4. 951

FREIGHT.

See **INSURANCE**, 2.

GUARDIANS OF THE POOR.

See **CORPORATION**, 2.

GOODS SOLD AND DELIVERED.

See **ASSUMPSIT**, 2.

HAWKER AND PEDLAR.

A hawker's license does not give the privilege of selling goods in a borough, where by a by-law made pursuant to charter and ancient custom, strangers are not permitted to trade. *Simson v. Moss*, T. 1 W. 4. 543

HIGHWAY.

1. By the general highway act 13 G. 3, c. 78, s. 64, the Court before which any indictment for non-repair of a road is tried, may award costs to the prosecutor if the defence appear to have been frivolous, or to the defendant, if it appear that the prosecution was vexatious. This section applies only to cases tried in the ordinary

course; and where, on an indictment removed by the defendant by certiorari, the Court above had ordered a new trial, and the *prosecutor's* costs of both trials to abide the event; it was held that this special rule took away the authority given by the statute, and that the Judge could not certify in favour of the *defendant*. *The King v. The Inhabitants of Salwick*, E. 1 W. 4. 186

2. An order of justices for diverting a highway and stopping up a part of it, described the highway by termini, and by reference to a plan; the part to be stopped up was described as so many yards of the said highway, lying between certain letters on the plan, and coloured blue. Notice was published (pursuant to the statute 55 G. 3, c. 68) of the order having been made; but the notice had no plan annexed, and merely described the road by termini, and the part to be stopped up as so many yards of such road:

Held (LITTLEDALE, J., dubitante), that the order explained by a plan annexed, was good; but (per totam curiam), that the notice was insufficient. *The King v. Horner and Roupell*, E. 1 W. 4. 150

3. A person who pays the highway rate within a parish, is not rendered a competent witness by the 54 G. 3, c. 170, s. 9, upon the trial of an issue, whether, within that parish, there is a custom that all persons residing therein, whose duty it is to cause the highways within the parish to be repaired, may take shingle from the sea-beach for the purpose of such repair; the custom not being a matter relating to rates or cesses within the meaning of the act. *Oxenden, Bart., v. Palmer*, E. 1 W. 4. 286

HUNGERFORD MARKET COMPANY.

By statute 11 G. 4, c. lxx., the Hungerford Market Company are empowered to purchase certain property, and the leases, &c., of premises on it; and the lessees and tenants for years or at will are to give up possession at three months' notice, but compensation is to be made to any such tenant required to quit before the expiration of his term. Sect. 19 provides, that all tenants for years, from year to year, or at will, "who shall sustain any loss, damage, or injury in respect of any interest whatsoever for good-will, improvements, tenant's fixtures, or otherwise, which they now enjoy, by reason of the passing of this act," shall be entitled to compensation, to be assessed, if necessary, by a jury.

A tenant from year to year was ejected by the company, but received a regular half-year's notice to quit. It appeared that she had been many years in possession; and that the tenancy was not likely to have been determined if the act had not passed: Held, that she was entitled to compensation for the whole marketable interest which she had in the premises at

the time when the act passed; and that the good-will of premises, though on so uncertain a tenure, was protected by the act as an interest which would, practically, have been valuable as between the tenant and a purchaser, though it was not a legal interest as against the landlord.

Otherwise, where the tenancy was from year to year, determinable at three months' notice ending with the year, and with a stipulation against underletting without leave.

In a case said to come within the protection of the act, where the company had brought ejectment, the Court refused to stay proceedings till compensation should be made, or a jury summoned. *Ex parte Farlow, in the Matter of the Hungerford Market Company*, E. 1 W. 4. 341

IDIOT.

See SETTLEMENT BY PARENTAGE.

INDENTURE.

See COVENANT, 1.

INDICTMENT.

1. The first count of an indictment charged an assault with intent to ravish; the second a common assault. The jury found the defendant guilty of *the misdemeanor and offence* in the said indictment specified, and the Court adjudged him, for the said misdemeanor, to be imprisoned two years, and kept to hard labour: Held, upon writ of error, that the word "misdemeanor" was nomen collectivum; that the finding of the jury, therefore, was in effect that the defendant was guilty of the whole matter charged by the indictment, and, consequently, that the judgment was warranted by the verdict. *The King v. Powell*, E. 1 W. 4. 75
2. In an action by an attorney for maliciously, and without probable cause, indicting him for sending a threatening letter, it appeared, that his clients having inquired of the defendants as to the truth of a representation made by a person who had offered to buy goods of them, the defendants replied, that they would not be responsible for the debt, but believed the person had the employment he represented. The goods were then supplied to him. His representation turned out to be false, and the plaintiff, by direction of his clients, wrote a letter to defendants, demanding payment of them of the price of the goods obtained from his clients through the defendants' representation, and stating that the circumstances made it incumbent on his clients to bring the matter under the notice of the public, if the defendants did not immediately discharge the amount, and that he had instructions to adopt proceedings if the matter were not ar-

ranged in the course of the morrow; and that as those measures would be of serious consequence to the defendants, he hoped they would prevent them by attention to his letter. The defendants were then summoned before a magistrate, to answer a charge of obtaining goods under false pretences. The plaintiff served the summons and attended with his clients, and the complaint was dismissed. The defendants afterwards indicted the plaintiff for sending a threatening letter contrary to the 7 & 8 G. 4, c. 29, s. 8, and he was acquitted. On the trial in this action, the Judge, without leaving any question to the jury, decided that there was reasonable and probable cause for preferring the indictment:

Held, that that decision was correct, and that the evidence did not raise a question of fact for the jury, whether the defendants bona fide believed that they had a reasonable cause for indicting, but a pure question of law for the Judge, whether the defendants had such reasonable cause. *Blackford, Gent., One, &c., v. Dod*, E. 1 W. 4. 179

3. The act 9 G. 4, c. 41, provides, that no person (not a parish patient) shall be taken into any house for the reception of lunatics, without a certificate of two medical practitioners, containing certain particulars. Sect. 80 enacts, that any person who shall *knowingly and with intention to deceive*, sign any such certificate untruly setting forth such particulars, shall be guilty of a misdemeanor; and likewise, that any physician, surgeon, &c., who shall sign any such certificate *without having visited and personally examined the patient*, shall be guilty of a misdemeanor. An indictment charged that the defendant, a surgeon, *knowingly and with intention to deceive*, signed a certificate required by the act, *without having visited and personally examined the patient*, contrary to the statute. The jury negatived the intention to deceive, and found the defendant guilty, subject to the opinion of the Court upon the case: Held, that in the description of this offence, the averment of intention was surplusage, and that such unnecessary matter might be rejected, as well in an indictment on a penal statute as at common law. *The King v. Jones*, T. 1 W. 4. 611

4. An indictment on the statute 7 & 8 G. 4, c. 80, s. 8, for feloniously damaging warps of linen yarn, with intent to destroy or render them useless, need not allege that the warps, at the time of the damage done, were prepared for, or employed in carding, spinning, weaving, &c., or otherwise manufacturing or preparing any goods or article of silk, woollen, linen, &c. *The King v. Ashton*, T. 1 W. 4. 750

INDORSEE.

See BILL OF EXCHANGE, 4.

INFORMATION.

1. The Court will grant a rule for a criminal information, on the sole testimony of a particeps criminis (uncontradicted), where the offence is against the public interests, as bribery in the election of an alderman, who will, by virtue of the office, be a justice of peace. *The King v. Steward and Others*, E. 1 W. 4. 12
2. An information removed from the late court of session at Chester, pursuant to 1 W. 4, c. 8, s. 4, may be proceeded upon in the Court of King's Bench, though no recognisances have been entered into for prosecuting with effect, &c., as required in the case of informations in K. B. by 4 & 5 W. & M. c. 18, s. 2.

In a case of quo warranto informations so removed, and on which subpoenas had issued before the removal, and been disobeyed, the court here refused to grant attachments, but recommended fresh subpoenas. *The King v. Roberts and Others*, E. 1 W. 4. 68

INLAND BILL.

See BILL OF EXCHANGE, 8.

INNKEEPER.

An innkeeper is responsible for money belonging to his guest. *Kent v. Shuckard*, M. 2 W. 4. 808

INSOLVENT DEBTOR'S COURT, ORDER OF.
See BANKRUPT, 1. ACTION ON THE CASE, 1.
EVIDENCE, 18.

INSPECTION OF CORPORATION DOCUMENTS.

See CORPORATION, 1.

INSURANCE.

1. A ship insured at and from Liverpool to Sierra Leone, arrived off the river Sierra Leone, where there was a regular establishment of pilots, about three o'clock in the evening. The captain hoisted a signal for a pilot; but no pilot having come on board, about ten o'clock at night he attempted to enter the river without one, and in so doing the ship took the ground and was lost. The Judge left it to the jury, whether the captain, in entering without a pilot, did what a prudent man ought to have done under the circumstances. The jury were of that opinion, and found for the plaintiff. On motion for a new trial on the ground that the verdict was against evidence: Held, that the underwriters were liable, and would have been so, although the captain had been wrong in attempting to enter the port without a pilot; he being a person of competent skill, having used reasonable diligence to obtain a pilot, and having exercised his discretion bona fide under the circumstances. *Phillips v. Headlaw*, E. 1 W. 4. 380

2 A policy of insurance was effected, at and from the river Plate to Canton and back, on specie, &c., shipped in the river Plate, and on the returns thereof, in any description of merchandise, with liberty to declare and value thereafter. The assured chartered a vessel on a voyage from Buenos Ayres to Canton and back, and they were to pay for the voyage 10,000 dollars in manner following: viz. "In China, all the sums that might be necessary for the payment of the port charges and other incidental expenses, the latter not exceeding 2000 dollars, and the balance at thirty days after the vessel's return to Buenos Ayres." The underwriters had no notice of the terms of the charter-party. The assured shipped on board this vessel at Buenos Ayres a quantity of specie, consigned to an agent at Canton, who, on the ship's arrival there, advanced to the captain a sum of money, being the amount of the port charges, and a further sum for incidental expenses; and he shipped other goods on board the vessel, on account of his principals, for the homeward voyage. No valuation was ever made in pursuance of the liberty reserved by the policy. The vessel on her return voyage was lost: Held, that the assured were not entitled to recover the two sums paid by their agent at Canton for port charges and other incidental expenses, as part of the value of the merchandise shipped at Canton, and insured by the policy, inasmuch as the money agreed to be paid there was not properly freight, and had no distinct relation to the goods shipped.

Quare, Whether, upon an open policy, a payment made on the shipment of goods, can, in the event of loss, be added to their price, so as to form part of their value. *Winter v. Haldiman*, T. 1 W. 4. 649

INTEREST.

1 Where a defendant sued upon a security carrying interest, pays money into Court sufficient to cover the principal, with interest down to the commencement of the action, but not to the time of paying in the money, the plaintiff may proceed, and a jury, on trial, is bound to give him damages for the interest accruing between the commencement of the action and the payment into Court. *Kidd v. Walker*, T. 1 W. 4. 705

3. On an award directing payment of money at a certain time, interest, from that time till payment, may be recovered by action, but not by motion for an attachment. *Churcher, Gent., One, &c., and Stringer, Gent., One, &c.*, T. 1 W. 4. 777

IRISHWOMAN.

See SETTLEMENT BY BIRTH, 2.

JOINT STOCK COMPANY.

See LIEN, 2.

A company were empowered by act of parliament to carry on certain works, and the committee were authorized to make calls for money upon the proprietors, not exceeding 10*l.* per share, from time to time as they should find necessary, so that no calls should be made at the interval of less than two months from each other. None of the powers of the act were to be put in force till 88,500*l.* were subscribed. The committee began the works before that sum was subscribed, and made a single order, calling on the proprietors for several payments of 10*l.* each, to be made at intervals of two months.

A subsequent act recited, that the capital of 88,500*l.* had not been subscribed; that the company had proceeded in the works, incurred debts, &c., and that a certain sum was due from defaulters in the payment of calls. It provided for carrying on the works, and for making further calls; and it enacted, that the powers, &c., of the former act (except where expressly altered) should remain vested in the company, though the 88,500*l.* had not been subscribed.

In an action by the company against one of the committee for money due on some of the calls made as above mentioned, others of which he had paid: Held, that the calls, being made all at one time, were irregular; that they were not ratified by the mention of them in the subsequent act, as it could not be presumed, in the absence of any expression to such effect, that the legislature, when passing that act, was apprised of their having been improperly made; and that the defendant was not estopped by having joined in making the calls or by his payment of part of them, from disputing their validity; for that, the calls being against law, no person could complain of having been misled into a compliance with them by the defendant's conduct or admissions. *The Stratford and Morton Railway Company v. Stratton*, T. 1 W. 4. 618

JUDGE'S CERTIFICATE.

See CERTIFICATE. HIGHWAY ACT, 1.

JUDGMENT.

See PRACTICE, 11. USURY, 1.

In an action brought in England to recover the value of a given sum in Jamaica currency, upon a judgment obtained in that island; the value is that sum in sterling money which the currency would have produced according to the actual rate of exchange between Jamaica and England at the date of the judgment. *Scott v. Bevan*, E. 1 W. 4. 78

JURISDICTION.

See COURT OF DELEGATES, 2. COURT OF REQUESTS, 2.

JUSTICES.

- 1 An order of justices directing A. to pay the churchwardens and overseers of the poor of a parish a weekly sum for the maintenance of B. and C., his grandsons, as long as they shall be chargeable to the parish, is good, without stating that the father is unable, absent, or dead. *The King v. James Cornish*, T. 1 W. 4. 498
2. The statute 56 G. 3, c. 139, s. 2, which directs that a parish indenture shall be allowed by two justices of the county into which the apprentice is to be bound, gives those justices a discretion to determine on the propriety of the binding generally, and not merely with regard to the fitness, respectively, of the master and apprentice. *The King v. Mills and Another, Justices of the County of Essex*, T. 1 W. 4. 578
3. Trespass for assaulting and turning plaintiff out of a police-office. Plea, that two of the defendants, being justices of the peace, were assembled in a police-office to adjudicate upon an information against A. B. for an offence against a penal statute, and were proceeding to hear and determine the same, when the plaintiff (being an attorney) entered the police office with the informer, not as his friend or as a spectator, but for the avowed purpose of acting as his attorney and advocate touching the information; and as such attorney and advocate, without the leave, and against the will, of the justices, was taking notes of the evidence of a witness then under examination before them, touching the matter of the said information, and was acting and taking a part in the proceedings as an attorney or advocate on behalf of the informer; that the above two defendants stated to the plaintiff that it was not their practice to suffer any person to appear and take part in any proceedings before them as an attorney or advocate, and requested him to desist from so doing; and although they were willing to permit the plaintiff to remain in the police-office as one of the public, yet that he would not desist from taking a part in the proceedings as such attorney or advocate, but asserted his right to be present and to take such part, and to act as such attorney and advocate for the informer; and unlawfully, and against the will of the justices, continued in the police-office, taking part and acting as aforesaid, in contempt of the justices; whereupon, by order of the above two defendants, the other defendants turned the plaintiff out of the office:

Held on demurrer, that this was a good plea, inasmuch as no person has by law a right to act as an advocate on the trial of an information before justices of the peace, without their permission. *Collier, Gent., One, &c., v. Hicks*, T. 1 W. 4. 668

JUSTIFICATION.

See EVIDENCE. PLEADING, 8.

KINGSTON-UPON-HULL.

See PORT

LANDLORD AND TENANT.

See COPYHOLD, 2. ACTION ON THE CASE, 1.

1. See HUNGERFORD MARKET COMPANY.

2. A tenant who has surrendered his term, but refuses to quit the premises, cannot, on ejectment brought by the landlord, be compelled to enter into the recognisance prescribed by the 1 G. 4, c. 87, s. 1, in cases where the term or interest has expired, or been determined by notice to quit. *Doe dem. The Right Hon. Sir N. C. Tindal v. Roe*, M. 2 W. 4. 922

LATITAT.

See PRACTICE, 4.

LEASE.

See COVENANT, 1.

LEGACY.

See ANNUITY, 2.

LEGAL INTEREST.

See ESTOPPEL, 1. MORTGAGE AND MORTGAGEE, 8.

LETTER.

See EVIDENCE, 8.

LIBEL.

See PLEADING, 8. PRACTICE, 11.

LIEN.

1. The statute of limitations bars the remedy only, not the debt, and, therefore, where an attorney for a plaintiff had obtained judgment, and the defendant was afterwards discharged under the Lords' Act, but, at a subsequent period, a fi. fa. issued against his goods, the sheriff levied the damages and costs; it was held, that the attorney (though he had taken no step in the cause within six years) had still a lien on the judgment for his bill of costs, and the Court directed the sheriff to pay him the amount out of the proceeds of the goods. *Higgins v. Scott*, E. 1 W. 4. 41?
2. Where a company, authorized by act of parliament to raise money for certain purposes, has given a bond purporting to be for a sum borrowed and advanced conformably to the act, it is not sufficient for them to plead to an action on such bond, that it was executed colourably, and that the money was not in fact borrowed or lent for the purposes of the statute, as the obligee well knew; the pleas not disclosing any fraud, or injury done to the shareholders in the company.

By a clause empowering such company to raise money by bonds, it was enacted, that every holder of them should be equally entitled to a claim or lien on the rates and sums of money to be taken by virtue of the act, in proportion to the amount advanced by such holders, as if the same had been advanced upon mortgages or annuities also grantable by the act, "without any preference by reason of the priority of date of any such securities, or on any other account whatsoever." Held, that an individual bondholder might sue the company upon his own bond, though there were other bonds, mortgages, &c., unsatisfied; the lien given by the act being only an additional security. *Hill v. The Proprietors of the Manchester and Salford Water Works*, T. 1 W. 4. 544

LIMESTONE MINE.

See POOR RATE, 2.

LIMITATION OF TIME.

See APPEAL, 1.

LUNATIC.

See INDICTMENT, 8.

MANDAMUS.

1. The Court will not grant an application by members of a corporate body, for a mandamus to inspect the documents of the corporation, unless it be shown that such inspection is necessary with reference to some specific dispute or question depending, in which the parties applying are interested; and the inspection will then only be granted to such extent as may be necessary for the particular occasion.

Where members of a corporation, merely alleging grounds on which they believed that its affairs were improperly conducted, and the officers unduly chosen, and complaining of misgovernment in some particular instances not affecting the parties themselves, or any matter then in dispute, applied for a mandamus to the master and wardens to allow them to inspect and take copies of all records, books, and muniments in the possession of the master and wardens, belonging to the company or relating to its affairs, the Court discharged the rule with costs. *The King v. The Master and Wardens of the Merchant Tailors' Company*, E. 1 W. 4. 115

2. The registrars of a diocese were authorized by their patent of office (under the bishop's hand and seal) to appoint a deputy, to be "approved of and allowed by the bishop;" who, if he should not approve of and allow the deputy named and proposed to him, was empowered to nominate another, with a salary payable out of the profits of the registrarship. The registrars appointed a deputy, subject

to the approbation and consent of the bishop, who, on being informed of it, answered that, "for good and sufficient reasons," he disapproved of the party nominated, but declined specifying his reasons. The Court refused a rule nisi for a mandamus to the bishop to admit the deputy. *The King v. The Lord Bishop of Gloucester*, E. 1 W. 4. 158

3. The Court will grant a mandamus to the inhabitants of a parish liable to contribute to the church rate, to meet and assemble together with the minister, to elect churchwardens.

The return to such a mandamus stated an immemorial custom in the parish to have no churchwarden, and that the duties appertaining by law to the office of churchwardens had been from time out of mind discharged by the overseers of the poor: Held, that inasmuch as overseers had not existed time out of mind, and as there were necessary duties appertaining to churchwardens, and there must have been some persons bound by law to discharge those duties, the custom set out in the return was bad.

The operation of the statute 1 W. 4, c. 21, s. 6 (authorizing the Court at their discretion to grant the costs of applications for mandamus, and of the writ, if issued and obeyed), is confined to cases where the application was originally made after the act came in force. *The King v. The Inhabitants of Wix*, E. 1 W. 4. 197

4. When the sessions on determining an appeal have granted a case, but none has been stated, the Court will, under some circumstances, direct a mandamus to the justices who heard the appeal, to state a case.

But not where it is clear that such a proceeding could lead to no result; as where the chairman, in consequence of his own opinion and that of the court upon the facts, refused to sign any statement but one which would have excluded the point of law relied upon by the party demanding a case. *The King v. The Justices of Pembrokeshire*, E. 1 W. 4. 391

5. To a mandamus calling on churchwardens and overseers to summon a meeting for the purpose of establishing a select vestry for the concerns of the poor, pursuant to 59 G. 3, c. 12, a return was made, stating that there was by custom, an ancient vestry in the parish, which had from time immemorial consulted and deliberated on parochial matters, and acted as a select vestry for the concerns of the poor; and that they had immemorially been accustomed to perform the duties imposed on select vestries by the statute:

Held, that the return was bad, since the statute imposes some duties, as the management of money raised by poor rates, and making orders for the government of overseers, which could not have

existed before the statute 43 Eliz. c. 2.
The King v. The Churchwardens and Overseers of St. Bartholomew the Great, London, T. 1 W. 4. 506

MALICIOUS PROSECUTION.

See **BANKRUPT**, 4. **INDICTMENT**, 2.

MARRIAGE ACT.

See **SETTLEMENT BY MARRIAGE**.

MARRIAGE PORTION.

See **BILL OF EXCHANGE**, 9.

MARRIAGE SETTLEMENT.

See **COVENANT**, 5.

MASTER AND SERVANT.

See **EVIDENCE**, 10.

MEMORIAL.

See **ANNUITY**, 4.

METALS.

An act for keeping in repair a harbour, imposed certain duties enumerated in a schedule annexed, on goods exported and imported. In the schedule, under the head "*metals*," certain specified duties were imposed on copper, brass, pewter, and tin; and on all other *metals* not enumerated, for every 10*l.* value 10*d.*: Held, that the latter words did not include gold and silver; and, therefore, that the commissioners were not entitled to demand for specie or bullion, 10*d.* for every 10*l.* value *Casher v. Holmes*, T. 1 W. 4. 592

METROPOLITAN PAVING ACT.

See **RATE**.

MINES.

See **POOR RATE**, 2.

In copyhold lands, although the property in the mines be in the lord, the possession of them is in the tenant. The latter, therefore, may maintain trespass against the owner of an adjoining colliery, for breaking and entering the subsoil and taking coal therein, although no trespass be committed on the surface. *Lewis v. Branthwaite*, E. 1 W. 4. 437

MISDEMEANOR.

See **INDICTMENT**.

MONEY PAID INTO COURT.

See **BAIL**, 5. **INTEREST**, 1. **ACTION ON THE CASE**, 1.

MORTGAGE.

See **MORTGAGOR AND MORTGAGEE**, 5.

MORTGAGOR AND MORTGAGEE.

1. A mortgagee effected policies on a ship
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valued at 8000*l.*, and the ship being lost, he received on the two insurances 8700*l.* An action being brought against him by one set of underwriters to recover back their proportion of the sum paid, above 8000*l.*, and the question being, whether the defendant had received more than the actual value of the ship, insurable by him: Held, that it was properly submitted to the jury, whether, in effecting the policies, the defendant meant to insure his own interest only, or that of the mortgagor also: a mortgagor, at least since the register act 6 G. 4, c. 110, not being an owner to any greater extent than that of the value mortgaged, and the mortgagor continuing an owner. *Irving v. Richardson*, E. 1 W. 4. 193

2. A debtor deposited the title deeds of houses with his creditor as a security, and afterwards executed an assignment of his interest in the houses to the same party; but this instrument was never registered, pursuant to the statute 7 Ann. c. 20. The debtor afterwards became bankrupt, and the assignment of his effects under the commission was duly registered. The assignees brought an action against the creditor for the rents of the houses which he had received from the time of the assignment made to him by the bankrupt: Held, that although this instrument was void, the rents, which the defendant, being equitable mortgagee, had received, could not be taken out of his hands by virtue of the registered assignment under the commission. *Sumpter and Others, Assignees of Pound, v. Cooper*, E. 1 W. 4. 225

3. A. having an equitable fee in certain lands, mortgaged the same to B. by lease and release. The release recited, that A. was legally or equitably entitled to the premises conveyed; and the releasor covenanted, that he was and stood lawfully or equitably seised in his demesne of and in, and otherwise well entitled to the same. The legal estate was subsequently conveyed to A., and he afterwards for a valuable consideration conveyed the same to C. Upon ejectment brought by B. against C.:

Held, first, that there being in the release no certain previous averment of any seisin in A., but only a recital and covenant that he was legally or equitably entitled, C. was not thereby estopped from setting up the legal estate acquired by him, after the execution of the release.

Held, 2dly, that the release did not operate as an estoppel by virtue of the words, "granted, bargained, sold, aliened, remised, released," &c., because the release passed nothing but what the releasor had at the time, and A. had not the legal title in the premises at the time when the release was made.

Held, 3dly, that this case did not fall

within the rule, that a mortgagor cannot dispute the title of his mortgagee, because C. claimed as a purchaser for a valuable consideration without notice, a legal interest which was not in A. at the time of the mortgage to B.; A. having then only an equitable interest, which passed to B., whose title as to that was not disputed. *Right, on the demise of Jefferys, v. Bucknell*, E. 1 W. 4. 278

4. In ejectment by a mortgagee, the mere fact of his having received interest on a mortgage down to a time later than the day of the demise in the declaration, does not amount to a recognition by him that the mortgagor or his tenant was in lawful possession of the premises till the time when such interest was paid, and consequently is no defence to the ejectment. *Doe dem. Rogers and Wife v. Cadwalader*, T. 1 W. 4. 478

5. By the stamp-act, 55 G. 3, c 184, sched., part 1, mortgages are subjected to a duty of 25*l.* if the amount of the money secured thereby be uncertain and without limit; but if it be limited, then to an ad valorem duty: Held, that the limit must be one expressed on the face of the deed. And, therefore, that a mortgage for 1500*l.*, with covenants for payment of the yearly premium and other costs and charges of an insurance of 1000*l.* upon a particular life for seven years, required a 25*l.* stamp. *Halse v. Peters*, 2 W. 4. 807

NEGLIGENCE.

See EVIDENCE, 2.

NON-BAILABLE WRIT.

See EJECTMENT, 1.

NOTICE TO PROVE CONSIDERATION.

See BILL OF EXCHANGE, 4.

NOTICE TO QUIT.

See PRACTICE, 4.

NUISANCE.

It is no defence to an action for obstructing ancient lights, that the nuisance merely affects the plaintiff's right as a reversioner, and that he has already, in a former action, recovered against the defendant for the same obstruction. *Shadwell v. Hutchinson*, E. 1 W. 4. 97

ORDER OF JUSTICES.

See JUSTICES.

ORDER FOR STOPPING UP HIGHWAY.

See HIGHWAY, 2.

PARISH INDENTURE.

See JUSTICES, 2.

PARTNERSHIP.

1. A., R., and O. carried on business as partners, under the firm of Ashby and Co., from February 1820 to May 1824, when O. retired, and the other two partners agreed to liquidate all the debts due from the partnership; and they continued the business as partners, under the firm of Ashby and Rowland. In June 1824 S. agreed to become a member of this last-mentioned partnership, as from the 18th of May preceding, but his name was not to be introduced, and the business was still carried on under the names of Ashby and Rowland only.

In July 1824, H., being indebted to L., drew a bill of exchange in his favour upon Ashby and Co., which bill was accepted by the partner R. in the names of Rowland and Co. H., the drawer of the bill, had had dealings with the firm of A., R., and O.; but whether that firm was indebted to him when the bill was drawn did not appear, nor did it appear that there had been any dealings between H., the drawer, and A., R., and S., after the entrance of S. into the partnership. The name of S. was never used or made known to any person dealing with the firm: Held, that A., R., and S. were liable upon this bill as acceptors. *Lloyd v. Ashby and Others*, E. 1 W. 4. 28

2. S. being indebted to a firm in which he was partner, gave a note in the name of another firm to which he also belonged, in discharge of his individual debt. The payees endorsed it over, and the endorsee sued the parties who appeared to be makers: Held, that this note was made in fraud of S.'s partner in the second firm, and could not be enforced against him by the payees, and that, at least under these circumstances of suspicion, the endorsee could not recover without proving that he took the note for value, though no notice had been given him to prove the consideration:

Held also, PARKER, J., dissentiente, that in all cases, where, from defect of consideration, the original payees cannot recover on the note or bill, the endorsee, to maintain an action against the maker or acceptor, must prove consideration given by himself or a prior endorsee, though he may have had no notice that such proof will be called for. *Heath v. Sansom and Evans*, E. 1 W. 4. 291

3. A., a coachmaker, entered into an agreement to furnish B. with a carriage, for the term of five years, at seventy-five guineas a year. At the time of making the contract, C. was a partner with A., but this was unknown to B., the business being carried on in the name of A. only. Before the expiration of three years the partnership between A. and C. was dissolved, A. having assigned all his interest in the business, and in the contract in question, to C., and the business was

afterwards carried on by C. alone. B. was informed by C. that the partnership was dissolved, and that he (C.) had become the purchaser of the carriage then in his, B.'s, service. The latter answered that he would not continue the contract with C., and that he would return the carriage to him at the end of the then current year, and he did so return it. An action having been brought in the names of A. and C., against B., for the two payments which became due during the last two years of the contract, it was held, that the action was not maintainable, the contract being personal, and A. having transferred his interest to C., and become incapable of performing his part of the agreement. *Robson and Sharpe v. Drummond*, E. 1 W. 4. 808

PARTY-WALL.

A tenant of premises, having built a party-wall thereon, let a portion of them, upon a building agreement, for 50*l.* a year. The sub-tenant built a house on his part of the ground, and in so doing made use of the party-wall. The agreement contained no stipulation in case of this being done. The sub-tenant underlet the house, when finished, at a rate exceeding 50*l.*: Held, that the original tenant was not entitled to compensation from his lessee under the building act 14 G. 3, c. 78, s. 41, for the use of the party-wall, since he himself, and not his sub-tenant, was the owner of the improved rent, within that clause. Semble, that the clause does not apply where the land adjacent to the party-wall is held under an agreement with the builder of it. *Williams v. Pocklington*, M. 2 W. 4. 878

PATENT.

A patent was taken out for improvements in evaporating sugar, &c. The specification was as follows:—"My invention consists in a method or apparatus as hereinafter described, by which I am enabled to evaporate liquids and solutions at a low temperature, &c. And my said invention and improvement consists in forcing, by means of bellows, or any other blowing apparatus, atmospheric or any other air, either in a hot or cold state, through the liquid or solution subjected to evaporation; and this I do by means of pipes, whose extremities reach nearly (or within such distance as may be found most suitable under peculiar circumstances) to the upper or interior area of the bottom of the pan or boiler containing such liquid or solution, the other extremities of such pipes being connected with larger pipes, which communicate with the bellows or other blowing apparatus which forces the air into them." The lesser pipes were to be equally distributed, and their lower ends on a level

with each other. It was further declared that the form of the apparatus might be varied, provided the essential properties were maintained: Held, that taking the whole of the specification together, it appeared that the invention consisted of the particular method or process of forcing, by means of bellows, &c., air through the liquid subjected to evaporation, viz. *by pipes connected with larger pipes, and placed as mentioned in the specification*; and, therefore, that it was not void because another patent had been before granted to other persons for effecting the same object, by a coil of pipes, (lying at the bottom of a vessel), perforated with small holes, or by a shallow cullender placed at the bottom of the vessel. *Hullett v. Hague*, E. 1 W. 4. 870

PAYMENT.

See EXECUTOR, 2.

PEW.

The right to sit in a pew may be apportioned; and, therefore, where by a faculty, reciting, "that A. had applied to have a pew appropriated to him in the parish church in respect of his said dwelling-house;" a pew was granted to him and his family for ever, and the owners and occupiers of the said dwelling-house; and the dwelling-house was afterwards subdivided into two: Held, that the occupier of one of the two (constituting a very small part of the original messuage) had some right to the pew; and, in virtue thereof, might maintain an action against a wrong-doer. *Harris v. Drew*, E. 1 W. 4. 164

PILOT.

See INSURANCE, 1.

PLEADING.

1. See ASSUMPSIT, 1.
2. See EXECUTOR, 2.
3. See COMPOSITION, 1.
4. See COURT OF REQUESTS, 2.
5. See ARBITRAMENT, 1.
6. An obligor sued on a bond reciting a certain consideration, is estopped from pleading that the consideration was different, unless he can make it appear by his plea that the real transaction was fraudulent or unlawful.

Where a company authorized by act of parliament to raise money for certain purposes, has given a bond purporting to be for a sum borrowed and advanced conformably to the act, it is not sufficient for them to plead to an action on such bond, that it was executed colourably, and that the money was not in fact borrowed or lent for the purposes of the statute, as the obligee well knew; the pleas not disclosing any fraud or injury done to the shareholders in the company. *Hill v. The*

Proprietors of the Manchester and Salford Water Works, T. 1 W. 4. 544

7. See INDICTMENT, 8.

8. Declaration stated that the defendant intending to cause it to be believed that the plaintiff was guilty of feloniously stealing a horse, published a libel concerning him. The libel, as set out, was headed "Horse-stealer," and then alleged that the plaintiff was taken up on suspicion of having stolen a horse, by a constable who was informed that "such a character," was at a certain public-house; it then went on to state circumstances of suspicion against the plaintiff, and ultimately that having obtained permission to go out of the constable's sight, he made his escape, but was retaken and confined in gaol for examination. Innuendo, that the plaintiff was guilty of feloniously stealing a horse.

The defendant pleaded the general issue, and then a justification as to all parts of the libel except the word "horse-stealer," setting out in this latter plea the several circumstances related in the libel: Held: that as the declaration alleged that the libel was intended to convey a charge of felony, and this intent was not denied by the plea, the statement of circumstances of suspicion to excuse part of the libel, was no sufficient justification: although *semble*, that where a libel contains propositions that may be separable from each other, one may be justified apart from the rest. *Mountney v. Watton*, T. 1 W. 4.

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PORT

The port of Kingston-upon-Hull is mentioned in acts of parliament, charters, and other documents, in two senses; first, according to the popular understanding, as denoting a particular place; and, secondly, in a larger acceptation, as comprising under one name a district of many places classed together for the purposes of the revenue, and of which Kingston-upon-Hull is the chief.

The statute 14 G. 3, c. 56, s. 42, which gives the Hull Dock Company a tonnage on ships coming into or going out of the harbour of Kingston-upon-Hull, and the company's basin of docks within the port of Kingston-upon-Hull, or *unlading or lading any of their cargo within the said port*, must be construed as using the term "port" in the popular sense; and not, therefore, as extending the burden of dock duties to places which, in point of local description, are without the port of Hull; as Goole, on the river Ouse. *The Dock Company of Kingston-upon-Hull v. Browne and Others*, E. 1 W. 4. 48

POOR RATE.

1. By an act for making a navigable communication between two places therein

mentioned, a company was formed, and authorized to purchase lands, &c., for the use of the navigation, and to make and maintain the same. The act then directed that the company should be rated and charged to all parliamentary and parochial taxes, rates, and assessments for any lands to be purchased or taken, or warehouses or other buildings to be erected by them in pursuance of that act, in the same proportions as other lands and buildings adjoining to or lying near the same were or should be rated and charged:

Held, that the company were liable to be rated for their lands and buildings at the same value as other adjacent lands and buildings, and not according to the improved value derived from their being used for the purposes of the navigation. *The King v. The Company of Proprietors of the Chelmer and Blackwater Navigation*, E. 1 W. 4. 14

2. The express mention in the statute 43 Eliz. c. 2, s. 1, of coal mines is a virtual exclusion of all other mines, and consequently other mines are not rateable to the relief of the poor.

Whether an excavation in the earth, from which limestone is obtained, be a mine or not, is a question of fact. But where the sessions found that the limestone was obtained and raised by sinking shafts perpendicularly down to the stratum, which lay forty or fifty yards below the surface of the ground, and that the stratum was worked by roads and gateheads, and the stone raised to the surface by machinery, or carried under ground to a tunnel (which is the mode used in obtaining coal and ironstone), the Court held, that the property was a limestone mine, and therefore not rateable to the relief of the poor. *The King v. The Inhabitants of Sedgley*, E. 1 W. 4. 65

POST OFFICE.

Letters having arrived at the post office, addressed to a party who had become bankrupt, the assignee (in that character) demanded them of the postmaster; and he believing bona fide that the assignee was entitled to have them for the purposes of the commission, delivered them up; this having been the practice of the office under similar circumstances, for more than thirty years: Held, that the postmaster was not liable under the act 9 Anne, c. 10, s. 40, for *wittingly, willingly, and knowingly* detaining letters, and causing them to be detained and opened. *Meirelles v. Banning*, M. 2 W. 4. 909

POWER, EXECUTION OF.

Testator devised a messuage and premises to his son for life, with power to demise for sixty-one years, "for the purpose of *new building or effectually rebuilding and*

repairing any messuage, &c., being or to be on the premises." The son granted a lease for that term, in which the tenant covenanted to expend 250*l.* at least, for the purpose of *effectually repairing* the messuage and premises, and putting them into complete repair, to the lessor's satisfaction; and he also covenanted when the same *should be so well and effectually repaired* as aforesaid, to repair and uphold the same as need should require during the term. On ejectment brought after the son's death by the remainder-man against the lessee: Held, that this lease was not a good execution of the power, inasmuch as a covenant *effectually to repair* (if the above-mentioned covenant were such) was not equivalent to a covenant *effectually to rebuild and repair*. And, assuming that an obligation on the tenant to repair effectually would have satisfied the power: Held (PARKE, J., and TAUNTON, J., doubting), that the present covenant would have been insufficient. *Doe dem. Dymoke v. Withers*, M. 2 W. 4. 896

PRACTICE.

See INFORMATION, 2.

1. See COACH PROPRIETOR.
2. See ATTORNEY, 1.
3. Costs of summons at Judge's chambers not allowed by the Court. *Reed v. Lee, Gent.*, E. 1 W. 4. 415
4. Where a non-bailable writ of latitat issues into a county palatine, and a mandate thereupon is obtained from the chancellor to the sheriff, service of either on the defendant will be sufficient. *Ashbrook v. Townley and Peek*, E. 1 W. 4. 416
5. Where money has been deposited in lieu of bail, and paid into court pursuant to 48 G. 3, c. 46, and the defendant does not perfect bail in time; the plaintiff will be allowed, on motion, to take the money out of court, though the defendant has rendered himself into custody since the time for putting in bail, if there be no affidavit of merits on his part. *Newman and Another, Assignees, v. Hodgson*, E. 1 W. 4. 422
6. An affidavit to hold to bail, stating that the defendant is indebted to the plaintiff 1000*l.* "on balance of account for money paid, laid out, and expended by the plaintiff to and for defendant, and at his request, and for money had and received by the defendant for the plaintiff, and for interest of moneys due by the defendant to the plaintiff," is not sufficiently certain. *Visgar and Another v. Delegal*, T. 1 W. 4. 571
7. An agreement entered into by a client with his attorney, to pay him at a certain specified rate for business to be done, is not binding; but the charges made according to such agreement may be allowed

on taxation, if the Master, on inquiring into them, considers them proper.

Where such charges had been allowed on taxation and paid, the Court (on application about four months after) refused to order a review of the taxation, it not being shown that the Master had forbore to exercise his judgment on the charges, in consequence of the agreement between attorney and client. *Drax v. Scroope*, T. 1 W. 4. 581

8. See INTEREST, 1.
9. A defendant being in custody of the sheriff of C., the plaintiff issued a testatum ca. sa., which which was delivered to the sheriff, and on the following day sued out habeas corpus ad satisfaciendum, to remove the defendant to the custody of the marshal: It was held, that the execution was completed by the delivery of the testatum ca. sa. to the sheriff, and the prisoner was remanded to the custody of the sheriff. *Owen v. Owen*, M. 2 W. 4. 805
10. The defendant below tendered a bill of exceptions, and afterwards brought error. The bill of exceptions not having been ready when the writ of error was returned, the Court, on consideration of the circumstances, allowed it to be tacked to the record afterwards. *Taylor v. Willans, (in Error)*, M. 2 W. 4. 846
11. An executor may, under the stat. 17 Car. 2, c. 8, s. 1, enter up judgment on a verdict obtained by his testator in an action for a libel. *Palmer v. Cohen*, M. 2 W. 4. 966
12. In an action of assumpsit against two defendants for goods sold, they pleaded non assumpserunt, and issue was joined on that plea in Michaelmas term 1880, and notice of trial given for the sittings after that term. Continuances were entered on the record to the 23d of May, 1831. On the 14th of May in that year one of the defendants obtained his certificate under a commission of bankrupt issued against him, and on the 5th of June he pleaded his bankruptcy puis darrein continuance, to which the plaintiffs demurred; but the latter proceedings were entered on the nisi prius record. The cause was tried on the 29th of June, and a general verdict found against both the defendants. The Court set aside this verdict for irregularity, on the ground that the plaintiffs were not entitled to have an absolute verdict against both the defendants, but contingent only against the one who pleaded his bankruptcy. *Thompson and Another v. J. Percival and C. Percival*, M. 2 W. 4. 957

PREROGATIVE COURT.

See PROBATE, 1.

PRESENTMENT.

See BILL OF EXCHANGE, 8.

PRINCIPAL AND AGENT.See **VENDOR AND VENDEE**, 8.

A wharfinger having received flour in that capacity, and without any authority to sell, disposed of it to a purchaser who had no notice of the want of authority. The wharfinger was in the habit of doing business as a flour factor: Held, nevertheless, that the act 6 G. 4, c. 94, s. 4, which protects the purchases made innocently and in the ordinary course of business from agents intrusted with goods, did not apply to this case, the wharfinger not being an agent within the meaning of the statute. *Monk v. Whittenbury*, T. 1 W. 4. 484

PRISONER.See **PRACTICE**, 9.**PROBABLE CAUSE.**See **MALICIOUS PROSECUTION**.**PROBATE.**

A person whose residence and property were in the diocese of Gloucester, went to Bristol, and there met with an accident, in consequence of which he was taken to the Bristol infirmary, and died there a few days after. Probate of his will was granted by the Bishop of Gloucester: Held, that the probate was regular, for the testator had died *in itinere*, and that this was a case within the principle of canon 92, Jac. 1, which provides, that when a man dies on a journey, the goods which he hath about him shall not cause his testament or administration to be liable to the prerogative court. *Doe dem. Allen v. Owens*, E. 1 W. 4. 428

PROCEDENDO.

1. The statute 10 G. 2, c. 28, s. 4, imposes a penalty of 50*l.* for acting any entertainment of the stage without license; and it is by sect. 6 enacted, "that the penalty shall be recovered in a summary way before two justices, to be levied by distress and sale, and that for want of sufficient distress, the offender shall be committed to prison for any time not exceeding six months, there to remain without bail or mainprize;" and then an appeal is given to the quarter sessions. A conviction by two justices under the statute having been affirmed on appeal, was, together with the order of sessions, removed into this Court by certiorari, and confirmed. A *levari facias* was issued out of this Court for the penalty, and there was a return of *nulla bona*. This Court not having authority to exercise the discretion given by the statute to the justices, as to the term of imprisonment, granted a *procedendo* to carry back to the sessions the record of conviction, and the order of sessions, and commanding the justices to enter continuances

upon the appeal from session to session, and proceed to award execution. *The King v. Neville*, E. 1 W. 4. 299

2. See **CORPORATION**, 2.

PROHIBITION.See **EVIDENCE**, 8.**PROMISSORY NOTE.**See **BILL OF EXCHANGE**, 4, 6, 7.**PROMOTIONS.**

See page 446, 782.

PROSECUTOR.See **CERTIORARI**, 1.**PUIS DARREIN CONTINUANCE.**See **PRACTICE**, 11.**QUESTION OF LAW.**See **INDICTMENT**, 2.**QUO WARRANTO.**See **INFORMATION**, 2. **EVIDENCE**, 8.**RATED INHABITANT.**See **CERTIORARI**, 1. **HIGHWAY**, 2.**RATE OF EXCHANGE.**See **JUDGMENT**, 1.**RATE.**

See **HIGHWAY**, 2. **SELECT VESTRY**, 2.
The metropolitan paving-act 57 G. 3, c. xxix., does not give the commissioners authority to take under their jurisdiction, or to make a rate for lighting and watching the footpaths on the side of any turnpike road within the jurisdiction of the act. *Loveridge v. Hodson*, T. 1 W. 4. 602

SEAL.See **EVIDENCE**, 18.**RECOGNISANCE.**See **INFORMATION**, 2. **LANDLORD AND TENANT**, 2.**RECORD.**See **WRIT OF ERROR**, 1.**REGISTRY ACT.**See **MORTGAGOR AND MORTGAGEE**, 2.**REGISTRAR.**See **MANDAMUS**, 2.**RESCINDING OF CONTRACT.**See **VENDOR AND VENDEE**, 8.**REVERSIONER.**See **NUISANCE**, 2.

RULE OF COURT,—page 446, 783, 788.

SELECT VESTRY.

1. See MANDAMUS, 5.
2. The statute 59 G. 3, c. 134, s. 30, enacts, that in every district, parish, or division of any parish or district, in which any church or chapel shall be built, in which there shall not be a distinct vestry belonging to such district or division, a select vestry, consisting of so many persons as shall be directed by the commissioners in that behalf, shall be appointed by the latter out of the substantial inhabitants of the district or division, *for the care and management of the concerns of the church, and all matters and things relating thereto*: Held, that a select vestry appointed pursuant to this provision of the act, has no power to impose a rate for the repair of the district church. *Cockburn v. Harvey and Another*, M. 1 W. 4. 797

SESSIONS.

See APPEAL.

SET-OFF.

See ARBITRAMENT, 4. BILL OF EXCHANGE, 9. COURT OF REQUESTS, 1.

SETTLEMENT—by Apprenticeship.

1. See EVIDENCE, 5.
2. An apprentice may gain a settlement by residing in a parish during his apprenticeship forty days, though not within the compass of any one year. *The King v. The Inhabitants of Aldstone*, E. 1 W. 4. 207
3. The pauper being the son of a certificated person, residing with his father under the certificate, as one of his family, was at the age of eleven years bound apprentice, and served his master in the certificated parish for eight years, when he was removed to the certifying parish, which parish acquiesced in his removal, and received him as their parishioner. The pauper stayed in that parish about a week, and then returned to his master in the certificated parish, and served him there more than forty days: Held, that the pauper did not gain a settlement by apprenticeship in that parish, inasmuch as the binding was before he became of age. *The King v. The Inhabitants of Queenborough*, E. 1 W. 4. 219
4. By a parish indenture which purported to be made between the churchwarden and overseers of the parish of D., in the county of Northampton, of the one part, and A. B. of Countesthorpe, in the county of Leicester, of the other part, it was witnessed that the said churchwarden and overseers of the parish of D., with the consent of two of his majesty's justices of the peace for the said county, dwelling in or near the said parish, had bound, &c.

The justices in their written consent in the margin of the indenture described themselves as justices of the county *aforesaid*: Held, that the words *county aforesaid*, had the same meaning as the words *said county* in the body of the indenture; and, that it sufficiently appeared, by reference to the latter words, that the consenting justices were justices of the county of Northampton. *The King v. The Inhabitants of Countesthorpe*, T. 1 W. 4. 487

5. An unstamped assignment of a parish apprentice stated that D. E., the new master, in consideration of 8*l.* 10*s.* paid him by H., the old master, agreed to accept the apprentice, &c.: Held, that parol evidence was admissible to show that the money paid on the assignment of the apprentice was parish money; and therefore, that the instrument did not require a stamp. *The King v. The Inhabitants of Llangunnor*, T. 1 W. 4. 616
6. An assignment of a parish apprentice is not subject to the regulations imposed by the statute 8 Anne, c. 9, and need not, therefore, be stamped within two months, nor must the consideration paid for such assignment be set forth in it. *The King v. The Inhabitants of Ide*, Mich. 1 W. 4. 866

SETTLEMENT—by Birth.

1. An unmarried pregnant pauper was removed by an order of justices from H. to M., and received by the parish officers there. On the following day she clandestinely, and of her own accord, returned to H., where she was delivered of a bastard, before the time for appealing against the order of removal had expired. The bastard was settled where born. *The King v. The Inhabitants of Halifax*, E. 1 W. 4. 211
2. Under the statute 59 G. 3, c. 12, s. 38, an Irish female pauper having a bastard child born in a parish in England, and within the age of nurture, may, on becoming chargeable, be passed to Ireland, though the child cannot be sent with her, the act not authorizing the removal of any settled person. *The King v. Bennett and Broughton, Justices of Middlesex*, T. 1 W. 4. 712

SETTLEMENT—by Estate.

A devised to his son, who had come into a parish with a certificate, an estate in these words:—"My desire is, that my son Robert shall live in that part of my house as he now doth, and at the same yearly rent which he now gives, as long as my son John" (to whom the testator devised the house in fee) "shall enjoy and own the same:" Held, that this was a devise of an estate pur autre vie, which discharged the certificate. Quære, Whether an estate conveyed to a certificated man on mere voluntary consideration, will dis-

charge the certificate? *The King v. The Inhabitants of Cassington*, M. 2 W. 4.

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SETTLEMENT—by Hiring and Service.

A pauper agreed with a sawyer for a twelve-month to learn sawing, and was to have 7s. 6d. out of every 20s. earned by his master and himself; he served out the year, in the parish of A., providing his own board and lodging; at the end of the year he made a new agreement for another year, at an increased allowance, and he lived out the second year with his master in A.: Held, that he did not thereby gain a settlement in A., inasmuch as the principal object of the agreement between him and his master being that he should learn, and his master teach him to learn sawing, it was a defective contract of apprenticeship. *The King v. The Inhabitants of Crediton*, T. 1 W. 4. 493

SETTLEMENT—by Marriage.

1. The statute 3 G. 4, c. 75, s. 2, enacts, "that in all cases of marriage had by license, before the passing of that act, without such consent as is required by the statute 26 G. 2, c. 88, s. 11, and where the parties shall have continued to live together as husband and wife, till the death of one of them or till the passing of that act (3 G. 4, c. 75), such marriage, if not otherwise invalid, shall be deemed to be good and valid to all intents and purposes whatsoever."

Sect. 3 provides, "that nothing in that act contained shall extend to render valid any marriage declared invalid by any court of competent jurisdiction before the passing of that act, nor any marriage where either of the parties shall at any time afterwards, during the life of the other party, have lawfully intermarried with any other person:"

Held, that a marriage which would have been void by the 26 G. 2, c. 83, and had once been rendered valid by the second section of the 3 G. 4, c. 75, could not, subsequently, be rendered invalid by the marriage of either of the parties, during the life of the other, with a third person.

The King v. The Inhabitants of St. John, Delpike, E. 1 W. 4. 226

2. See EVIDENCE, 14.

SETTLEMENT—by Parentage.

An idiot, though separated from his parent after the age of twenty-one, cannot be emancipated. *The King v. The Inhabitants of Much Cowarne*, M. 2 W. 4. 860

SETTLEMENT—by renting a Tenement.

1. See EVIDENCE, 9.

2. In 1818 the pauper took of one A. a field of potatoes, at the rent of 12l. A. agreed to supply lime and manure, and to give

the field three ploughings to prepare it for planting potatoes, without which the field would have been worth less than 10l. a year. About a week after the agreement the pauper entered upon the land, it having then been only once ploughed, and no lime or manure having been supplied; but A. performed all he had agreed to do, before the pauper planted his potatoes; and the field was then worth 12l. a year: Held, that as, by contract, the land was to be made of the value of 10l. a year at the landlord's expense, the tenement was of that value within the meaning of 13 & 14 Car. 2, c. 12, when the pauper came to settle, though the improvement was not completed until after he entered. *The King v. The Inhabitants of Huntsham*, T. 1 W. 4. 503

3. Pauper, on the 1st of Nov. 1813, came to reside on a tenement of the yearly value of 10l. The bargain with the owner was, that the pauper should live a month in it for nothing on trial, and that if, on that trial, he liked it, he should take it at Martinmas at the yearly rent of 14l. The pauper resided in it for a month on trial, and then took it at the rent agreed upon; and, without any interruption in the residence, continued on it for the following month: Held, that he thereby gained a settlement. *The King v. The Inhabitants of Helsham*, T. 1 W. 4. 620

4. The pauper took a house, consisting of a house-place, a chamber over it, and above that a garret, which extended over the lower rooms in the adjoining house, in addition to the rest of the premises, from the same landlord, for a year, at 10l. rent. The whole was under the same roof, though there was no internal communication. He dwelt in that part which he first hired, and put a journeyman to work in the other: Held, that he gained a settlement under the 6 G. 4, c. 57, by renting a tenement consisting of a distinct building. *The King v. Inhabitants of Macclesfield*, M. 2 W. 4. 870

SHERIFF.

1. See BANKRUPT, 1.
2. See ACTION ON THE CASE, 1.
3. See EVIDENCE, 13.

SIGNIFICAVIT.

See COURT OF DELEGATES.

SPECIE.

See METALS.

SPECIFIC CHATTEL.

See VENDOR AND VENDEE, 6.

STAMP.

1. See EVIDENCE, 5.
2. See COVENANT, 1.
3. Estates of inheritance in a manor were held at the will of the lord, according to

the custom of the manor, subject to fines on the death of the lord or tenant, and on alienation, and to other dues. The tenant might aliene by customary bargain and sale, with the license of the lord endorsed. Courts were held twice a year, at which new tenants on death or alienation were bound to appear and have their names entered on a roll, paying a shilling to the steward. On default made, the lord might seize quousque:

Held, that such enrolment was not an admittance within the stamp act 55 G. 3, c. 184, which lays a duty on "customary estates passing by surrender and admittance, or by admittance only, and not by deed;" but that in case of alienation, the estates passed by the conveyance, licensed by the lord; and where the lands descended, the heir became entitled as in case of freehold; and, consequently, that a person taking as heir was not bound, on enrolment, to receive a stamped admittance from the steward. *Doe dem. The Earl of Carlisle v. Towns*, T. 1 W. 4. 585

4. See SETTLEMENT by Apprenticeship, 5.

5. See MORTGAGOR AND MORTGAGEE, 5.

6. See SETTLEMENT by Apprenticeship, 6.

7. The 55 G. 3, c. 184, sched., part 3, imposes an ad valorem duty on letters of administration where the estate is above 20*l.* in value, exclusive of what the deceased shall have been possessed of or entitled to as a trustee, and not beneficially. An intestate had granted an annuity to A., and had afterwards by deed conveyed his property to B., who covenanted to indemnify him against the payment of the annuity. Default having been subsequently made in the payments during the intestate's lifetime, the annuitant sued the grantor's administratrix, and recovered judgment for debt and costs exceeding 20*l.* The administratrix paid this, and then sued B. on his covenant for the amount: Held, that the right to recover this sum was part of the intestate's estate, and rendered the letters of administration liable to stamp duty; and that the intestate, if he had lived, could not have been considered, in respect to this sum, as a mere trustee for the annuitant, having no beneficial interest. *Carr, Administratrix, &c., of Walker, v. Roberts*, M. 2 W. 4. 905

STATUTE. CONSTRUCTION OF.

See TRUSTEES.

Where two acts of parliament, which passed during the same session and were to come into operation the same day, are repugnant to each other, that which last received the royal assent must prevail, and be considered pro tanto a repeal of the other. *The King v. The Justices of Middlesex*, M. 2 W. 4. 818

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STATUTE OF LIMITATIONS.

1. In assumpsit, the issue was whether the action had been commenced within six years, and a verdict was taken for the plaintiff, subject to the opinion of the Court on a special case. It appeared by the case that process had been sued out within six years, in an action corresponding with the present, and continued on the roll down to the first return of Trinity term 1827, when the six years had elapsed; and that a testatum special capias was sued out in the present action, tested on the last return of the same term; but there was no continuance from the first to the last return. The question being, whether on this state of facts, the latter process was sufficiently connected with the former to take the case out of the statute, the Court, after two arguments of the special case, allowed the plaintiffs, on motion, to amend the roll by entering the required continuance.

And it was held, that this proceeding did not entitle the bail to be exonerated, although they had become bail, and had omitted to render the plaintiff, in reliance on the defence under the statute.

The declaration, which originally corresponded with the process, had been amended by a Judge's order, by increasing the damages, and adding counts for interest and commission: Held, that this was no ground for exonerating the bail, the amount of damages being before an arbitrator, who might apportion them so as to prevent the bail being improperly charged. *Taylor and Another, Assignees of Walsh, v. Gregory*, E. 1 W. 4. 257

2. See LIEN, 1.

3. See ASSUMPSIT, 2.

STAYING PROCEEDINGS.

See ACTION ON THE CASE, 1.

SUMMONS.

See PRACTICE, 8.

SUPERSEDING COMMISSION.

See EVIDENCE, 14.

SURGEON.

See INDICTMENT, 8.

SURPLUSAGE.

See INDICTMENT, 8.

SURRENDER OF TERM, PRESUMPTION OF.

See EVIDENCE, 11.

SURVIVORSHIP.

See BARON AND FEME.

TAXATION.

See ATTORNEY, 1

TITHES.

See DISTRESS.

THREATENING LETTER.

See MALICIOUS PROSECUTION, 1.

TITLE.

See ANNUITY, 2.

TOLL.

1. Where a toll of corn had been customarily taken by dipping into the sack so as to bring out a certain quantity, and the collector varied from the proper mode (by *sweeping* instead of *lifting* the toll), so as to take more: Held, that trover lay against him for the excess. *Norman v. Bell and Another*, E. 1 W. 4. 190
2. Where a canal is made pursuant to act of parliament, the right of the proprietor to toll is derived entirely from the act; and is to be considered as if there was a bargain between them and the public, the terms of which are expressed by the statute: and the rule of construction is, that any ambiguity in the terms of the contract must operate against the company of adventurers, and in favour of the public. The proprietors, therefore, can claim nothing which is not clearly given to them by the act.

A canal was formed upon two levels, which were connected by a chain of locks. Upon the upper level there was no lock whatever.

By the act of parliament for making the canal, all persons were to be at liberty to navigate thereupon with boats, upon payment of such rates and dues as should be demanded by the company, not exceeding the rates therein mentioned; and by another clause the company were authorized to take certain rates and duties for every ton of iron, and other goods navigated on any part of the canal, and *which should pass through any one or more of the locks*; and power was given to the owners of adjoining lands to use pleasure boats on the canal, without paying dues, so as the same did not pass through any lock, and were not used for carrying goods:

Held, that this act gave no right to demand toll for boats navigating the upper level of the canal, in which there were no locks. *The Proprietors of the Stourbridge Canal v. Wheeley and Others*, M. 2 W. 4.

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8. By a turnpike act, a certain toll was to be taken at every turnpike on the road from W. to O. for four horses drawing any carriage, &c. A subsequent section provided, that no person should pay toll more than once in the same day for passing or repassing with the same horses or carriages through any of the turnpikes, but that every person, after having paid toll

once, and producing a ticket, should pass with the same horses and carriages toll free during such day:

Held, that a second toll was payable for passing on the same day two toll-gates on the road with the same carriage, but drawn by different horses, for that the clause imposing the toll was clear, and the exempting clause either meant that the horses should be the same, or was too ambiguous to control the previous enactment. *Hopkins v. Thorogood*, M. 2 W. 4.

916

TONNAGE.

See PORT. .

TRANSFERRING CONTRACT.

See PARTNERSHIP, 8.

TRESPASS.

1. See EVIDENCE, 1.
2. In an action by the payee against the acceptor of a bill of exchange drawn for the balance of purchase-money of articles bought at a sale, it is no defence that two months after delivery of the goods to the vendee, the vendor forcibly retook possession of them; for the vendee cannot treat that as a rescinding of the contract, but must bring trespass. *Stephens v. Wilkinson and Another*, E. 1 W. 4. 820
8. In copyhold lands, although the property in mines be in the lord, the possession of them is in the tenant. The latter, therefore, may maintain trespass against the owner of an adjoining colliery, for breaking and entering the subsoil and taking coal therein, although no trespass be committed on the surface. *Lewis v. Brant-waite*, E. 1 W. 4. 437
4. See JUSTICES, 8.
5. A master of a fly-boat who is hired by a canal company at weekly wages, may maintain trespass for cutting a rope fastened to the vessel, whereby it was being towed along an inland navigation, although the vessel and the rope were the property of the company. *Moore v. Robinson*, M. 2 W. 4. 817

TROVER.

1. See BANKRUPT, 1.
2. See TOLL, 1.
8. See EVIDENCE, 12.

TRUSTEES.

By an act for the relief of the poor of a parish, the vicar, churchwardens, and overseers for the time being, and certain persons named, were to be trustees for putting the act in execution; and a meeting was to be held every third year to elect new trustees in the room of those who should have died, removed, become

disqualified, or relinquished office; so that the number should every third year be filled up to *fifty-one, over and besides the vicar, churchwardens, and overseers for the time being*. One of the fifty-one trustees having become churchwarden: Held, that no vacancy was created thereby. *Rex v. The Trustees of St. Mary Abbots, Kensington*, T. 1 W. 4. 740

TURNPIKE.

See TOLL, 8.

UNLIQUIDATED DAMAGES.

See BANKRUPT, 5, 6.

USURY.

A. at B.'s request advanced him 200*l.* and took his warrant of attorney for payment as follows: 100*l.* at Christmas 1829, if both should be then living; 100*l.* at Midsummer 1830, if both should be then living; and 100*l.* at Christmas 1830, on the same condition. Judgment being entered up for the last 100*l.*, and a motion made to set it aside, as grounded on an evidently usurious contract: Held, that this did not sufficiently appear to warrant the interposition of the Court. *Flight v. Chaplin*, E. 1 W. 4. 112

VARIANCE.

See ASSUMPSIT, 1. COURT OF REQUESTS, 2.

VENDOR AND VENDEE.

See ASSUMPSIT, 4.

1. See EVIDENCE, 2.
2. See BILL OF EXCHANGE, 2.
3. In an action by the payee against the acceptor of a bill of exchange drawn for the balance of the purchase-money of articles bought at a sale, it is no defence, that two months after delivery of the goods to the vendee, the vendor forcibly retook possession of them; for the vendee cannot treat that act of the vendor as a rescinding of the contract, but must bring trespass. *Stephens v. Wilkinson and Another*, E. 1 W. 4. 820
4. See ANNUITY, 2.
5. Goods were sold at six months' credit, payment to be then made by a bill at *two or three months*, at the purchaser's option: Held, PARKE, J., dubitante, that this was in effect a nine months' credit, and, consequently, that an action for goods sold and delivered commenced within six years from the end of the nine months was in time to save the statute of limitations. *Helps v. Winterbottom*, E. 1 W. 4. 431
6. A person who has purchased a horse warranted sound, sold it again, and then repurchased it, cannot, on discovering that the horse was unsound when first sold, require the original vendor to take it back

again; nor can he by reason of the unsoundness, resist an action by such vendor for the price. But he may give the breach of warranty in evidence in reduction of damages

Semble, that the purchaser of a *specific chattel* under warranty, having once accepted it, can in no instance return the chattel, or resist an action for the price, on the ground of breach of warranty, unless in case of fraud, or express agreement.

But where the contract was executory only when the chattel was received, as where goods are ordered of a manufacturer, and he contracts to supply them of a certain quality, or fit for a certain purpose; in which case the vendee may rescind the contract if the goods do not answer the warranty, provided he has not kept them longer than was necessary for the purpose of trial, or exercised the dominion of an owner over them, as by selling them to another person. *Street v. Blay*, E. 1 W. 4. 456

7. See PRINCIPAL AND AGENT.
8. The plaintiffs, who were brokers, bought goods of the defendant, on account of H., and by his authority. The purchase was made in their own names, but the vendor was informed that there was an unnamed principal. The plaintiffs afterwards, under a general authority from H., contracted to sell the same goods, which the defendant had not yet delivered. H., on hearing of the latter contract, told the plaintiffs that he would have nothing to do with the goods, either as buyer or seller; and in this they acquiesced. The defendant then refused to deliver the goods, and the plaintiffs sued him for damages sustained by them in consequence: Held, that the renunciation of the contract by H., and the plaintiffs' acquiescence in it, formed no objection to their right to recover. *Short and Others v. Spackman*, M. 2 W. 4. 962

VENUE.

See COACH PROPRIETOR.

VERDICT.

See WRIT OF ERROR.

WARRANT OF ATTORNEY.

See ANNUITY, 3.

WARRANTY.

See ASSUMPSIT, 1. EVIDENCE, 2. VENDOR AND VENDEE, 6.

WILL.

See EVIDENCE, 14. PROBATE.

WITNESS.

See EVIDENCE, 7, 10, 18.

WRIT DE CONTUMACE CAPIENDO.

See COURT OF DELEGATES.

WRIT OF ERROR.

See COSTS, 2.

1. A return to a writ of error, directed to the commissioners of oyer and terminer of the city of London, set out the record of an indictment found against the defendant before the lord mayor and others; and stated that he was tried upon the said indictment by a jury of the country at the next session holden before the lord mayor, several of the judges, aldermen, recorder, and others assigned by certain letters patent under the great seal directed to them, *or any two or more of them*, to inquire of certain offences: that he was, by the verdict of such jury, found guilty; and that thereupon judgment was given *by the Court* against him. Upon this return the defendant assigned errors in law and in fact. The errors in law were, that the judgment was insufficient, and that judgment should have been given for the defendant. The errors in fact were, first, that when the jury gave their verdict there was but one of the justices named in the commission present in Court; and, secondly, that the verdict at the time it was so given, was not entered of record. The king's coroner and attorney answered "in nullo est erratum," and prayed that the judgment might be affirmed:

Held, as to the first error in fact, that as it appeared by the record, that the verdict was given at a session holden before several of the commissioners and justices, the plaintiff in error could not be allowed to aver, in contradiction to the record,

that only one of the justices was present when the jury gave their verdict, and the answer, in nullo est erratum, is no admission of the fact assigned for error unless it could be lawfully assigned, and is well assigned in point of form.

Held, also, that the second error in fact assigned, was no error, inasmuch as it was impossible that a verdict should be recorded at the time when it was given, the recording of it being necessarily an act subsequent to the delivery of the verdict by a jury. *The King v. Carlile*, E. 1 W. 4. 362

2. After error brought, the Court can only amend the record in respect of misprision of the clerk; and, therefore, the Court refused to allow a plaintiff in replevin, who had pleaded two bad pleas, and after judgment in his favour in this court, and error brought, to withdraw the same, and plead de novo. *Green v. Miller*, T. 1 W. 4. 781

3. Error was brought in K. B. upon a judgment at the Old Bailey, and one ground assigned was, that a material fact stated on the record was not true. This Court held such an averment inadmissible, and affirmed the judgment. The fact being as alleged by the defendant below, the Court there afterwards ordered the record to be amended, and their clerk, by a rule of this Court, with the consent of the crown, came into the Court, and made the amendment.

Upon motion, afterwards, that the case might again be set down for argument: Held, that this Court could not rehear it after the expiration of the term in which judgment was given; and that the only remedy was by writ of error to the House of Lords. *The King v. Carlile*, M. 2 W. 4. 974

REPORTS OF CASES

ARGUED AND DETERMINED

IN THE COURTS OF

Common Pleas, King's Bench,

EXCHEQUER CHAMBER,

AND ON

THE CIRCUITS,

CONTAINING CASES FROM MICHAELMAS TERM, 1825, TO TRINITY
TERM, 1830, INCLUSIVE.

BY

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AND
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1872.

JUDGES
OF THE
COURT OF KING'S BENCH
AND THE
COURT OF COMMON PLEAS,

DURING THE PERIOD OF THE REPORTS CONTAINED IN THESE VOLUMES.

Sir CHARLES ABBOTT, afterwards Lord TENTERDEN, C. J.
Sir CHARLES DRAPER BEST, Knt. C. J.
Sir JOHN BAYLEY, Knt.
Sir NICHOLAS CONYNGHAM TINDAL, Knt., Ch. J.
Sir GEORGE SOWLEY HOLROYD, Knt.
Sir JAMES ALLAN PARK, Knt.
Sir JOSEPH LITTLEDALE, Knt.
Sir JAMES BURROUGH, Knt.
Sir JAMES PARKE, Knt.
Sir STEPHEN GASELEE, Knt.

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Sir CHARLES WETHERALL, Knt.
Sir JAMES SCARLETT, Knt.

SOLICITORS-GENERAL

Sir NICHOLAS CONYNGHAM TINDAL, Knt.
Sir EDWARD BURTENSCHAW SUGDEN, Knt.

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REPORTS OF CASES
ARGUED AND RULED
AT NISI PRIUS,
IN THE COURTS OF
KING'S BENCH AND COMMON PLEAS,
AND ON THE WESTERN AND OXFORD CIRCUITS;

**From the Sittings after Michaelmas Term, 7 Geo. IV. 1827, to the
Sittings after Trinity Term, 1 Wil. IV. 1830. Inclusive.**

By WILLIAM MOODY,
AND
BENJAMIN HEATH MALKIN,
of Lincoln's Inn, Esqs., Barristers at Law.

VOL. I.

CASES

ARGUED AND DECIDED

AT

NISI PRIUS IN K. B.,

AT THE SITTINGS AFTER

Michaelmas Term,

7 GEO. IV. 1826.

WATSON, Gent., one, &c., v. REYNOLDS, Gent., one, &c.—p. 1.

In an action for words, not actionable in themselves, evidence of their truth may be given under the general issue, to disprove malice. The attorney of a party claiming title to premises put up for sale, is not liable to an action for slander of title, if he bona fide, though without authority, makes such objections to the seller's title, as his principal would have been authorized in making.

CASE for slander of title. Plea, not guilty.

The lands in question were held under a lease from Home. They were put up for sale by auction in seven lots, for the unexpired term of the lease. The defendant attended at the sale, and said publicly, before the first lot was put up, "There is a suit depending in the Court of Chancery in respect to this property: encroachments have been made upon the landlord's ground; the buildings are contrary to the original lease; proceedings will be taken against the purchaser, and actions of ejectment brought against the tenants; there is no power to sell the premises; a good title cannot be made, as the Chancery suit will convince everybody." These words constituted the slander complained of.

The defendant proposed to show that in fact encroachments had been made, and that the buildings were inconsistent with a covenant in the lease.

Brougham objected that this evidence could only be given on a plea justifying the words; not on the general issue to disprove malice. Had a justification been pleaded, the plaintiffs might have been prepared to prove that no encroachments had been made, and that the covenant had been complied with.

Marryatt observed that no justification had been pleaded in *Hargrave v. Le Breton*, 4 Burr. 2422, or in *Smith v. Spooner*, 3 Taun. 246.

LITTLEDALE, J. I do not think it necessary. This is not like a common action of slander, which is maintainable without special damage; but it is founded entirely on the special damage, and I am clearly of opinion that in such a case no plea of justification can be necessary. (a)

(a) See also *Pitt v. Donovan*, 1 M. & S. 639. It does not necessarily follow that the same facts which may be given in evidence as a defence under the general issue may not also properly be

It appeared that in point of fact, there was a Chancery suit pending with respect to the premises, but no explanation was given of its nature, or of the parties to it. It also appeared that encroachments had been made, but that they were confined to the last lot of the seven put up for sale; and that the buildings were warranted by the lease. Home also appeared to have considered, that fraud had been practised on him in the original granting of the lease, and to have been generally dissatisfied with the plaintiff's conduct as to the premises, and anxious to recover the land, if possible. The defendant was Home's attorney, and was directed by him to go to the sale and mention the encroachments, but he was not desired to make any other statement.

LITTLEDALE, J., in summing up to the jury, said, that with respect to the words charging encroachments, the defendant would be liable or not, as Home would have been, had he himself spoken the words he authorized the defendant to use. But the authority given to him to complain of the encroachments would not extend to protect him in making any statement substantially different, and unconnected with that question; and such were the statements with respect to the Chancery suit, and the want of title.

With respect to those parts of the slander the facts appear to stand thus. Home seems to have acted on the impression that he was imposed upon in the original granting of the lease. Reynolds, his attorney, must be taken to be acquainted with the circumstances of that transaction: he must have known of the existing Chancery suit, and might naturally have contemplated bringing ejectments as a proceeding consequent upon the supposed fraud. Then the question is, whether there is any malice in his stating these circumstances. If under these circumstances Home had gone to the sale and spoken the words which Reynolds did, would not he have acted as an honest man? If so, would you, even if he were mistaken, say, that he acted from malice? Ought he not, meaning to claim the property adversely to purchasers, to have made it known at the auction? If so, then, Reynolds being attorney for Home and knowing all the same circumstances, is it not his duty, if it would be Home's, to go, even without authority, to the sale, to make the same representations?

His Lordship then commented on some evidence relied on to prove malice; and concluded by leaving it to the jury to consider, whether Reynolds acted *bonâ fide* as attorney for Home, and whether either Reynolds or Home acted unfairly, or without due consideration. If on reasonable grounds of objection, they interfered for the purpose of preventing purchasers from buying a questionable or a bad title, the verdict should be for the defendant; if they interfered for the purpose of depreciating the plaintiff's property, or without having made reasonable inquiries, or taken reasonable care to ascertain what they stated, then the verdict must be for the plaintiff. (a)

put on the record as the matter of a special plea. *Carr v. Hinchliff*, 4 B. & C. 547. These cases, however, when they occur, are exceptions to the common rule; and it may be doubted whether, in an action for slander of title, any justification can properly be pleaded. In *Smith v. Spooner*, 3 Taun. 246, Lawrence, J., said, that "the specially pleading a justification would admit the facts stated in the declaration, and, amongst others, the malice." See also the judgment of Holroyd, J., in *Fairman v. Ives*, 5 B. & A. 642. And the malice and the damage being admitted, the truth of the statement might perhaps furnish no justification; for in *Bewe v. Roach*, 1 M. & S. 304, it was held that a declaration charging the words to be "malicious, injurious, and unlawful," was sufficient, without stating them to be false. In most cases, indeed, of slander of title, their truth, however maliciously they were spoken, would probably amount to an answer to the action, because it would disprove the legal damage; as for instance, if the slander complained of was an entire denial that the plaintiff had any title to the land: in which case he could not complain of being hindered in selling that which he had no right whatever to sell. It would indeed, perhaps, be difficult to find any instance in which the absolute truth of the statement would not in this way be an answer to the action in a case of slander of title, though such may exist in other actions which proceed entirely on the special damage; as in some cases of an action for slander of character, where the words are not actionable in themselves. And in all cases where the action is founded exclusively on the injury really sustained, and the plaintiff would not be entitled even to a nominal verdict, without proving real injury, if the answer to the action consist only in disproving the existence of that injury, by circumstances to be disclosed by the defendant, a plea of those circumstances by way of justification would be bad, as amounting to the general issue.

(a) See *Gerard v. Dickenson*, 4 Co. 18; *Bannister v. Bannister*, cit. 4 Co. 17 a; *Smith v. Spooner*, 3 Taun. 246, and *Pitt v. Donovan*, 1 M. & S. 639, that a party claiming title *bonâ fide*.

Verdict for the plaintiff; damages one farthing.
Brougham and *Chitty* for the plaintiff.
Marryatt and *Curwood* for the defendant.

is not liable to this action for a representation made *bonâ fide*, though it be erroneous: nor is his attorney, stating substantially what his principal so claiming title desires him. *Hargrave v. Le Breton*, 4 Burr, 2422. But a mere stranger is; *Mildmay's case*, 1 Co. 177, b; *Rowe v. Roach*, 1 M. & S. 304; *Jenk. Cent.* 247, pl. 36; at least unless his statement be true; and *quære*, if the truth would in all cases be a sufficient defence for him. See *supra*, note (a), p. 457.

WILSON and Another, Assignees, &c., v. WHITAKER and Another, Sheriff, &c., and HARRIS.—p. 8.

The statute 3 G. 4, c. 39, § 2 (as to the filing warrants of attorney to render the judgments entered on them effectual against subsequent commission of bankruptcy), is not repealed by the statute 6 Geo. 4, c. 16, § 81.
Quære whether the stat. 3 Geo. 4, c. 39, § 2, extends to cases where there has been no act of bankruptcy at the time of giving the warrant of attorney.

DOE dem. NEVILLE v. DUNBAR.—p. 10.

Service of a notice to quit on a servant at the tenant's dwelling-house is sufficient, although the tenant be not informed of it till within half a year of its expiration.

EJECTMENT. The only question was as to the service of a notice to quit.

Mr. Neville's attorney went on the 22d March, to the defendant's house, and there served two copies of a notice to quit, one on the servant, the other on a lady there. The attorney was told that the defendant would not be there till the 26th. The notice was to quit on the 29th September. It was attempted to show that both the lady and the servant on whom the notices were served were dead; and it was argued that in that case, as the defendant would be unable to call them to prove that they did not communicate the notice to him by the 25th March, according to the course suggested by Buller, J., in *Jones d. Griffiths v. Marsh*, 4 T. R. 464, and as the sufficiency of the notice was treated, both in that case and in *Doe d. Bross v. Lucas*, 5 Esp. 153, and in *Doe d. Lord Bradford v. Watkins*, 7 East, 553, as depending on the presumption that it came to the tenant's hands, there would be no sufficient evidence that it did so, to entitle the plaintiff to a verdict. The proof however failed as to the servant.

ARBOTT, Ld. C. J. I have no doubt that the service of the notice was sufficient. The question does not arise here, for the servant might be called: but I have no doubt of the absolute sufficiency of the notice; were it to be held otherwise, a landlord would have no means of determining a tenancy, if his tenant happened to be absent from his house at the time when it was necessary to serve the notice.

Verdict for the plaintiff.(a)

(a) See *Widger v. Browning*, 2 Carr. & P. 523, that personal service of notice is not generally necessary; and in *Jones d. Griffiths v. Marsh*, 4 T. R. 464, although Buller, J., suggested that the defendant might prove that the notice was not delivered to him, Lord Kenyon expressly proceeded on the ground that service at the dwelling-house was sufficient, without resorting to any presumption of the actual receipt; and stated that personal service was generally necessary only in case of process to bring the party into contempt. Lord Kenyon's doctrine, indeed, as to the absolute sufficiency of service at the dwelling-house, must probably be confined to service upon a servant there, as was the case in *Jones v. Marsh*. With this limitation, the decision of the case of *Doe v. Lucas* (although Lord Ellenborough, in his arguments, in some degree adopted the reasoning of Buller, J., as to the power of disproving actual notice) is not inconsistent with Lord Kenyon's doctrine; for in *Doe v. Lucas*, the notice having been merely left on the premises, and not delivered to any one, there was not even a reasonable probability that the defendant would ever actually become aware of it.

Campbell and Whateley for the plaintiff.
Scarlett, Chitty, and Lee for the defendant.

FARQUHAR, Bart. and Others, v. SOUTHEY and Others.—p. 14.

[S. C. 2 Carr. & P. 497. 12 E. C. L. R. 697.]

A. and Co. having accepted a bill for B.'s accommodation, B. paid it into the hands of his bankers without notice, who retained possession of it for several years, charging him with interest for it, but never debiting him with the amount of the bill. During this time, they became bankers to A. and Co. also, but never gave them notice that they held the bill against them. The balance of B.'s account was always against him; that of the account of A. and Co. in their favour, but very seldom to the amount of the bill. In an action by the bankers against A. and Co., Held, that, under these circumstances, the defendants were not discharged unless the jury should infer that the plaintiffs had entered into an agreement to discharge the defendants, or had expressly renounced all intention of holding them liable on the bill.

If a bill is addressed to "A. and B." by the name of "A. B. and Co.," and they accept it by the name of "A. and B.," and the address of the bill is afterwards altered to "A. and B.," this is an immaterial alteration, and does not discharge the acceptor.

ASSUMPSIT by endorsees against acceptors of two bills of exchange for 500*l.* each. The bills were accepted by the defendants for the accommodation of one Leader, and endorsed by him for value, and without notice to the plaintiffs, his bankers. During the whole time which elapsed from Leader's endorsing the bills to the plaintiffs, till his bankruptcy, he was always considerably indebted to them. The plaintiffs never presented the bills for payment, or made any demand on the defendants till after Leader's bankruptcy, three years after one bill became due, and four after the other. The defendants, about two years after the second bill became due, opened a banking account with the plaintiffs, but the plaintiffs did not inform them that they held these bills against them. The balances which the defendants had in the hands of the plaintiffs seldom exceeded 300*l.*, but on two occasions they had for two or three days balances to their credit of more than 1000*l.*, on which the plaintiffs made no claim. The plaintiffs debited Leader up to the time of his bankruptcy with interest on the bills, but never carried the bills themselves to the debit of his account.

Scarlett, for the defendants, after referring to *Laxton v. Peat*, 2 Campb. 185, said, he should not contend, after the objections made to that case by the Court of Common Pleas, in *Fentum v. Pocock*, 5 Taunt. 192, that the circumstances stated above furnished any ground of nonsuit; but it was for the jury to consider, as a question of fact, whether the plaintiffs had not by their conduct, in receiving interest from Leader, in giving no notice for so long a time to the defendants of their claim on them, and in allowing them to draw for balances exceeding the amount of the bills, shown that they trusted to the drawer, who was really primarily liable, and abandoned all claim on the defendants; and he cited *Ellis v. Galindo*, 1 Doug. 250, n., to show that this was a question for the jury, and also that the circumstances formed a good defence.

F. Pollock, *contra*, contended, that the plaintiffs were not legally bound to apply, and would not have been morally justified in applying the balances due to the defendants in satisfaction of the bills; that nothing short of an express declaration by the holder of his intention to discharge the acceptor would be sufficient to discharge him, for which he cited *Dingwall v. Dunster*, 1 Doug. 247, and that none of the transactions between the plaintiffs and Leader, after the endorsement of the bills, affected their right to recover, for which he cited *Atwood v. Crowdie*, 1 Stark. 488.

LITTLEDALE, J. The plaintiffs having given value for these bills, the defendants are liable upon them, although their acceptance was without consideration, unless they have been discharged. Now the liability of an acceptor differs much from that of a drawer; he can only be discharged by an express agreement

among the parties that he shall be so, by an express renunciation by the holder of his liability, by payment, or by neglect on the part of the holder to get paid when he had proper means of payment in his power. There is here no actual payment, nor do I think any of the transactions between the plaintiffs and Leader amount to payment; nor do I think the defendants discharged by the circumstance that the plaintiffs did not, when they had money of the defendants in their hands, to an amount exceeding that of the bills, apply that money in extinction of the bills: they were not, in my opinion, bound to do so, nor would they have dealt well by the defendants if they had done it: there can, therefore, be no laches in their not doing it. The only question I can leave to the jury is, whether they can collect from the dealings between the parties evidence that the plaintiffs ever entered into an agreement to discharge the defendants, or expressly renounced all intention of holding them liable. If the jury are satisfied of the existence of either of these facts, their verdict should be for the defendants; but if otherwise for the plaintiffs.^(a)

One of the bills was originally addressed, "Messrs. Southey, Crowther, and Co.," but the words "and Co." were obliterated, and the word "and" inserted; so that, when produced, the address was, "Messrs. Southey and Crowther." The acceptance was signed, "Southey and Crowther." It did not appear when the alteration had been made.

Scarlett objected that the plaintiffs could not recover on this bill without explaining the alteration.

F. Pollock, for the plaintiffs, said, The alteration, even if made after acceptance, was immaterial; the defendants would be equally liable in whichever way the bill was directed to them.

LITTLEDALE, J., was of opinion that the alteration, even if made after acceptance, was immaterial, and did not discharge the acceptors.

Verdict for the plaintiff.

F. Pollock and *Henderson* for the plaintiffs.

Scarlett and *Parke* for the defendants.

(a) See *Adams v. Gregg*, 2 Stark. 531.

MAINWARING v. LESLIE.—p. 18.

[S. C. 2 Carr. & P. 507. 12 E. C. L. R. 702.]

In an action against a husband for goods supplied to his wife living separate from him, the plaintiff must give evidence of the circumstances of the separation, to show that they were such as to authorize her to bind the husband.^(a)

(a) The cases which settle how far the husband is liable for goods furnished to the wife are very copiously collected in Stark. on Ev., Part IV., 692, &c., and in Selwyn's *Nisi Prius*, Tit. *Baron and Feme*, L.; but it does not appear to have been so much a matter of question, until the case of *Montague v. Benedict*, 3 B. & C. 631, what proof the plaintiff must give in the first instance, as what the law was on the whole facts given in evidence on one side and on the other; and in point of fact, in a large proportion of instances, the proof of the circumstances appears to have come from the defendant. In that case, however, a similar question to that in the principal case arose, and was decided in conformity with the same rule; for it was held that the plaintiff must prove circumstances to show the assent of the husband to the wife's contracts for goods, not being necessary, even during cohabitation.

FREEMAN v. JURY and Another.—p. 19.

A. being in possession under a lease for years, underlet the premises from year to year to the defendants, who knew the extent of A.'s interest. The plaintiff afterwards took a lease of the same premises, expectant on the determination of A.'s term, and the defendants, after the determination of A.'s term, continued in possession for a quarter of a year, when they paid the rent for that period, and claimed to give up the premises: Held, in an action for use and occupation for a subsequent period, that there was no evidence of a tenancy continuing beyond that quarter of a year.

ASSUMPSIT for use and occupation.

The premises in question were held, among others, by Moline, under a lease from the 'Cutlers' Company, which expired at Christmas 1825. The plaintiff took a lease from the 'Cutlers' Company of all the premises held by Moline, commencing at the expiration of Moline's term. The defendants occupied the premises in question, with full knowledge of the extent of Moline's interest under the company, as his tenants from year to year for several years, and continued in possession at the expiration of his term at Christmas 1825. On Lady Day 1826, they paid one quarter's rent to the plaintiff, at the same rate they had previously paid to Moline, and claimed to give up possession. The plaintiff refused to take possession, conceiving himself entitled to notice of quitting; but the defendants left the premises, and they continued unoccupied during the period for which the action was brought.

Scarlett objected that there was no evidence of a tenancy beyond Lady Day. Moline's interest, and consequently the interest of the defendants under him, was determined; and the only evidence of a contract with the plaintiff was the payment of rent for one quarter at Lady Day. That might just as likely be rent due on a taking for a single quarter as on any other taking, and, therefore, was no evidence of a continuing tenancy.

Marryatt, for the plaintiff, answered, that the payment of rent at the old rate was evidence of a holding on upon the old terms. It would be evidence for the defendant that the plaintiff had accepted him as tenant on those terms, it must, therefore, be evidence for the plaintiff that he was so.

ABBOTT, Ld. C. J. The plaintiff cannot recover unless he proves a new continuing tenancy under him. Moline's interest expired at Christmas 1825, and the defendants were aware that it did so; their tenancy from year to year under Moline must, therefore, be considered as necessarily expiring at that time. Then their old tenancy being determined, there is no evidence of a new continuing tenancy, for the fact relied on admits equally well of a different construction.

Nonsuit.

Marryatt and Comyn for the plaintiff.

Scarlett and Chitty for the defendant.

REX v. DANIEL PRINCE.—p. 21.

One gratuitously engaging to procure the discount of a bill, not being in any business within which such an employment regularly falls, cannot be convicted of embezzling the bill deposited with him for the purpose of procuring such discount, under the statute 52 Geo. 3, c. 63.

EARITH and Another, Assignees of TROLLOPE, v. SCHRODER and Another.—p. 24.

In an action by assignees of a bankrupt for a demand for which the bankrupt, if solvent, might sue, the depositions are conclusive evidence of the matters contained in them, unless the bank-

rupt, within the time prescribed by the statute 6 Geo. 4, c. 16, s. 92, gives notice of his intention to dispute the commission, although the action was commenced, and notice given by the defendant that he would dispute the act of bankruptcy, &c., within the time allowed to the bankrupt to give such notice, if the cause be not brought to trial till after that time has elapsed.

TAYLOR v. BRIGGS and Another.—p. 28.

Assumpsit on a charter-party, "freight to be paid partly in cash, and partly by approved bill." The owner took, without apprising the defendants, a bill from the consignee of the cargo for part of the freight, which was dishonoured: Held, that the defendants were not discharged thereby from the amount of the bill.

THIS was an action of assumpsit on a charter-party of affreightment of the ship *Essex*, whereby the plaintiff engaged to bring a cargo of cotton from Alexandria in Egypt to Liverpool, "the freight to be paid on unloading, and right delivery of the cargo, one-third in cash, and the remainder by an approved bill at two months' date."

The plaintiff's demand consisted of various particulars; and it was agreed that the amount of the verdict should be referred, the opinion of the learned judge being first taken on several disputed points, of which one was, whether the defendants were to be allowed the sum of 1000*l.* as paid, under the following circumstances:—

The ship proceeded with a cargo of cotton to Liverpool, consigned to Garnett of that place. Upon the plaintiff's proceeding to unload the cargo, he applied to Garnett, who had authority from the defendants to settle the freight, for an advance of money. He received from him his acceptance for 1000*l.* This was done without first apprising the defendants; but the plaintiff, who did not negotiate the bill, applied to the defendants for their endorsement, which they refused. Garnett, at the time the bill was given, was in good circumstances and credit, but failed before the bill became due, and it was never paid.

It was contended, for the defendants, that the plaintiff having taken this bill without their consent, thereby discharged them of so much of the freight.

ABBOTT, *Ld. C. J.* I have no doubt about the point. The bill, even if taken as an approved bill, cannot, if unproductive, be reckoned in discharge of the defendants.

Verdict for the plaintiff, subject to a reference.(a)

Scarlett, Marryatt and Campbell for the plaintiff.

The Solicitor-General and F. Pollock for the defendant.

(a) In *Bolton v. Reichard*, 1 *Esp.* 106, where the plaintiff received from the defendant an order on his bankers, directing them to give the plaintiff a good bill at seventy days for the amount due, it is said that a bill was given and proved bad, and that Lord Kenyon held that the defendant was discharged, and that it was incumbent on the plaintiff to see that he got good bills. But the report does not seem to be accurate; for in *Bolton v. Richard*, 6 *T. R.* 139, which seems to be the same case, though it appears there that no bill was actually given, Lord Kenyon said, "If the bankers had given the plaintiff a bill on an insolvent person for the amount of the defendant's check on them, it would have been too much, perhaps, to have said that that would have cancelled the plaintiff's demand;" and both *Grose* and *Lawrence, J.*, in speaking of the case as it would have stood if a bill had been given, say that the receipt of "a good bill, a bill drawn on a solvent person," would have settled the account. The decision, indeed, was in favour of the defendant, but not on the ground that he took on himself the risk of the bill, but that he had taken the bankers themselves as his debtors: and the case is therefore rather an authority in favour of the decision in the principal case than against it. And the same law may be collected from the case of *Brown v. Kewley*, 2 *B. & P.* 518.

If therefore a bill be taken which turns out to be bad, there seems to be no difference, as to the party's right to receive further payment, whether there be an original stipulation that the payment should be made by bill or not; and in the latter case the receipt of a bill is no discharge if it afterwards prove bad, unless the party expressly take it as payment, and agree to run the risk of the bill. See *Puckford v. Maxwell*, 6 *T. R.* 52; *Owenson v. Morse*, 7 *T. R.* 64; *Tapley v. Martens*, 8 *T. R.* 451; *Everett v. Collins*, 2 *Camp.* 515; *Marsh v. Pedder*, 4 *Camp.* 257; *Holt N. P. C.* 72. In the case indeed of *Dutton v. Solomonson*, 3 *B. & P.* 582, Lord Alvanley expressed a doubt, whether on a contract for the purchase of goods, to be paid for by a bill at two months, an action of *indebitatus assumpsit* would lie, even at the expiration of that period, and whether

the remedy would not be by a special action; but this was considered to be otherwise in *Mason v. Price*, 4 East, 147, and expressly overruled in *Brooke v. White*, 1 N. R. 330. Even the remedy, therefore, differs only during the stipulated period of credit; and in none of the latter cases was any doubt suggested as to the seller's right to receive further payment, although it was held that, during the time stipulated for the currency of the bills, he could only proceed on the special contract.

LANAUZE v. PALMER.—p. 31.

An examined copy of a letter, containing notice of the dishonour of a bill of exchange which is not produced, nor the subject-matter of the action, is not admissible without notice to produce the letter sent.

THIS was an action by the endorsee against the endorser of nine bills of exchange.

The defendant's endorsements, purporting to be made specially to J. M'Manus, were none of them in the handwriting of the defendant, but it was attempted to charge him on the bills by virtue of an authority to M'Manus to use his name. To prove this, twenty-five other bills were put in, all of them having similar endorsements, and all of which had been taken up by the defendant's bankers who had kept the bills. All the names on these bills and those sued on, except the defendant and M'Manus's, were fictitious. M'Manus, who had resided in Dublin, absconded upon the discovery of the forgeries.

Other bills similarly endorsed had been dishonoured and taken up by M'Manus, and therefore were not produced by the plaintiff. To show that notice of the dishonour of these bills had been given to the defendant, examined copies of letters containing such notices were offered.

Scarlett objected that no notice to produce these letters had been given, and that the rule of not requiring notice to produce a notice of dishonour only applied to the bills sued on, *Kine v. Beaumont*, 3 Brod. & Bing. 288.

ABBOTT, Ld. C. J. I think notice to produce is necessary. It does not fall within the exception of bills produced and the subject-matter of the action, where no notice is necessary. Verdict for the plaintiff.

F. Pollock and *Brougham* for the plaintiff.

Scarlett and *Patteson* for the defendant.

TOMPKINS v. ASHBY.—p. 32.

A demurrer or plea to a bill in equity does not so admit the facts charged in it, as to be evidence against the defendant of those facts in a future action between the same parties.

ASSUMPSIT for money deposited by the plaintiff with the defendant.

The defence suggested that the money was deposited for a particular purpose (the answering the differences on some Mexican bonds), and applied to that purpose.

The defendant had filed a bill in Chancery against the plaintiff, alleging, among other things, the circumstances now relied on with respect to the Mexican bonds. The plaintiff had originally demurred to this bill; but the demurrer being overruled, he put in an answer, *pleading* to that part of the bill which respected the Mexican bonds, and answering the remainder of the bill.

Scarlett, for the defendant, proposed to read the proceedings in Chancery, as amounting to an admission on the part of the plaintiff of the circumstances respecting the Mexican bonds as stated in the defendant's bill.

ABBOTT, Ld. C. J., refused the evidence; observing that, after a demurrer to

a bill in equity, if the demurrer were overruled, the party might still go on and answer; and that, consequently, the demurrer was to be taken as an absolute admission of the facts charged; and that on the same principle a plea in equity could not be so, for that it amounted merely to a statement of circumstances, to prove, that, *supposing* the facts charged to be true, the defendant is not bound to answer: it could, therefore, no more amount to an admission of those facts, than a witness who declines to answer a question can be held to admit the fact inquired into.

Verdict for the plaintiff.

Marryatt and Reader for the plaintiff.

Scarlett and F. Pollock for the defendant.

A rule nisi to enter a nonsuit was obtained in Hilary term, on the ground that the acknowledgment produced,

"Sept. 15, 1824.

"Mr. Tompkins has left in my hand 200*l*."

"J. ASHBY."

required a stamp, but the other point was not mentioned; and the rule obtained was afterwards discharged.

SITTINGS AFTER HILARY TERM, IN K. B.

8 GEO. IV.—1827.

DAVIDSON v. SEYMOUR, Esquire.—p. 34.

The new sheriff is not answerable for the escape of a debtor taken in execution in the time of his predecessor, and not delivered over to him by indenture.

DEBT against the sheriff of Brecknockshire, for the escape of a debtor taken in execution.

It appeared that the debtor, being in custody of the defendant's predecessor, was removed by habeas corpus to London on 22d February, and while in London he made his escape from the gaoler who took him there. No precise proof was given of the period of the escape; but the debtor was removed from the prison at Brecon before any indenture turning over the prisoners from the old to the new sheriff was executed.

It was suggested, that it was a question for the jury at what time the actual escape took place; and that if they thought it was after the defendant came into office, the plaintiff would be entitled to a verdict.

ABBOTT, Ld. C. J. The plaintiff must be called. The debtor is not shown to have been ever in the custody of the defendant. It does not appear whether he was at all in custody while the defendant was sheriff; and, at all events, he was not comprised in the indenture by which his predecessor delivered over his prisoners to him. That ceremony is necessary to the change of custody.

Nonsuit.(a)

Scarlett and Hutchinson for the plaintiff.

Campbell for the defendant.

(a) In *Poulter v. Greenwood*, Bar. 367, it is said to have been held that an assignment of prisoners by an under-sheriff to the succeeding high sheriff (*though not by indenture*) is a good assignment. The note, however, is a very short one, and does not at all state the circumstances of the case, or the grounds of the decision. Indeed, in *Sir T. Reade's case*, 2 Roll. 146, it is said that the sheriff is indictable for the escape of a prisoner attainted of felony, although he were never delivered to him by indenture, *if he have taken upon himself the custody of the prisoners*: and in *Smalman and Lane's case*, 2 Leon. 54, where the debtor had not been regularly turned over to the new sheriff, Anderson, C. J., held, that the new sheriff might, if he pleased, return him in *custodia sua*, and so charge himself. And some such circumstance must probably

have existed in the case of *Poulter v. Greenwood*; for the general necessity of a delivery by indenture seems fully established. See *Smalman and Lane's case*, *qua supra*. Indeed, the principal questions which have arisen on the subject have assumed the truth of this rule. Thus it has been held, that even if the debtor remain in the gaol, but is not turned over by the old sheriff to the new one, he is never in custody of the new sheriff, and cannot therefore be charged in execution for a new debt, as being in such custody. *Hanmer v. Warner* (or *Winner*), 1 Sid. 335, 2 Keb. 224. But he continues in custody of the old sheriff (*ib.* and see *Dowsewell v. Reynold*, Cro. Jac. 587, and *Westby's case*, 3 Co. 71 b), so that the old sheriff may at any time, if he has been continually in custody, turn him over to his successor for the time being, even though there have been intermediate sheriffs. *Hanmer v. Warner*. So also questions have arisen as to the liability of the old sheriff under such circumstances. In *Smalman v. Lane*, Anderson, C. J., held the non-delivery to the new sheriff to be no escape in the old sheriff, as the debtor continued in actual custody; but *Periam, J.*, held the contrary, that the old sheriff's authority was determined, and so that it was an escape in him. And in *Egerton v. Morgan*, 1 Bulst. 69, *Flemings, C. J.*, *Williams, J.*, and *Croke, J.*, held that a prisoner not delivered over by indenture to the new sheriff, might well continue in custody of the old one; but *Fenner, J.*, and *Yelverton, J.*, thought he could not be so kept, and that it would be an escape in the old sheriff; but they all agreed that he had never been in the custody of the new sheriff. Indeed, in *D'Abridgecourt's case*, as cited in Cro. Eliz. 366, and Poph. 85, it is said, that where the old sheriff kept a prisoner in execution in a house at Warwick, and did not deliver him over by indenture to his successor, and the prisoner afterwards escaped, the old sheriff was held liable for that escape; but the case appears, from the circumstances, to be the same with *Smalman and Lane's case*, though the decision is stated somewhat differently. It seems, however, to be assumed in *Westby's case*, 3 Co. 71 b, Cro. Eliz. 366, Poph. 85, Mo. 688, that the old sheriff may well keep a prisoner in custody after the new one takes upon himself the office. In that case it was held, that it was not enough to charge the new sheriff that he has had the prisoner delivered over to him, but that he must also have notice of the executions wherewith he is charged. Therefore, when a prisoner in execution at the suit of D. and of the plaintiffs was delivered over by the old sheriffs of London to their successors by indenture, and the indenture specified D.'s execution, but did not mention that of the plaintiff, this was held an escape in the old sheriffs; for the prisoner was not in the custody of their successors at the plaintiff's suit, that execution not being mentioned; nor was he in the custody of the old sheriffs, *they having actually delivered him over*. (See 1 Sid. 335.) From the report of this case in *Moore*, it would seem sufficient that the sheriff should have notice of the executions by parol; but, according to Lord Coke, it seems that they should be stated in the indenture, or at least that the new sheriff may compel the old sheriff to state them so: and so also the case is stated, in *Dalton*, p. 16, that the new sheriff may, if he pleases, accept of parol notice, but that he may insist on having the executions comprised in the indenture.

LEWIS and Another v. SAPIO.—p. 39.

The signature of a party to a bill of exchange may be proved by a person who has seen him write his surname only.

ASSUMPSIT by payee against the drawer of a bill of exchange.

The drawer's signature to the bill was "L. B. Sapiro." The witness who proved his handwriting, said he had seen him write his name several times, but always thus, "Mr. Sapiro;" and he had never seen any other writing by him.

Busby, for the defendant, objected, that this was not sufficient proof, the witness never having seen the defendant write the whole of the signature he was to prove; for which he cited *Powell v. Ford*, 2 Stark. N. P. C. 164, in which Lord Ellenborough ruled that such proof was insufficient.

ABBOTT, Ld. C. J. I will not abide by any such decision as that. The witness has seen the defendant write his surname: he believes the surname in the defendant's signature on the bill is written by him. It is quite enough.

Verdict for the plaintiffs.

Scarlett and Platt for the plaintiffs.

Busby for the defendant.

THOMPSON and Another v. BROWN and WESTON.—p. 40.

When a partner in trade liable for a sole debt contracted before his partnership, and also liable for partnership debts, pays money to the creditor on account, the creditor cannot apply such payment to the first debt, if the money paid was in fact the money of the partnership.

ASSUMPSIT for goods sold and delivered.

The defendants became partners in trade on the 1st January, 1824, and continued so until the 1st January, 1825. Before the partnership, Brown was indebted to the plaintiffs, who were ironmongers, in the sum of 60*l.*, and, during the partnership, goods were supplied on the partnership account to the amount of 210*l.* Early in the year 1824 Brown paid to the plaintiff, on the general account, a check for 60*l.*; and, after the dissolution, 150*l.* was paid expressly for the partnership debt by Weston, Brown having become insolvent.

It was doubtful, on the evidence, whether the check was the property of the partnership, or the sole property of Brown; and it was contended, for the plaintiffs, that the payment having been made without any appropriation, the defendants were at liberty to apply it to the first items in the account, and in that case the defendants as partners would still be liable for the balance of the partnership debt.^(a)

ABBOTT, *Ld. C. J.* The general rule certainly is, that when money is paid generally, without any appropriation, it ought to be applied to the first items in the account; but the rule is subject to this qualification, that when there are distinct demands, one against persons in partnership, and another against only one of the partners, if the money paid be the money of the partners the creditor is not at liberty to apply it to the payment of the debt of the individual: that would be allowing the creditor to pay the debt of one person with the money of others. The question for you is, was this check the property of the partners or not.

Verdict for the defendants.

Scarlett and *Chilton* for the plaintiffs.

Gurney and *Campbell* for the defendants.

^(a) *Rodenham v. Purchas*, 2 B. & A. 39, and the cases there cited. *Brooke v. Enderby*, 2 Brod. & Bing. 70. *Simson v. Ingham*, 2 B. & C. 65.

THORNTON and Others v. MEUX.—p. 48.

Where a broker effects a sale between two parties, the bought and sold notes delivered to them, and not the entry in his books, are the proper evidence of the contract.

ASSUMPSIT for goods sold and delivered, goods bargained and sold, &c.

The sale was effected through the agency of Messrs. Sharp, brokers, who transmitted a note of the contract to each party. The note sent to the plaintiffs stated the sale as "made on their account to our principal T. Meux;" and after stating the quantity, price, and time of delivery, proceeded thus: "To be paid for in cash by the brokers, at the expiration of fourteen days after finishing the landing of a parcel by a ship, if delivered from scale, or in like manner after receipt of the order for delivery, if from warehouse." The note sent to the defendants omitted the words "by the brokers."

Marryatt proposed to show the entry in the broker's book as evidence to prove which of the two notes described the transaction correctly.

Scarlett and *Campbell* objected. Neither party saw the book; they are, therefore, only bound by the communication they receive. It is the duty of the broker to enter the contract in his book, for the convenience of the parties if they want to refer to it; but the notes are what bind them; and if the notes vary from the book, the parties are only bound by what they receive. And they referred to *Grant v. Fletcher*, 5 B. & C. 436.

ABBOTT, *Ld. C. J.* I used to think at one time that the broker's book was the proper evidence of the contract; but I afterwards changed my opinion, and held conformably to the opinion of the rest of the court, that the copies delivered to the parties were the evidence of the contract they entered into, still feeling it to

be a duty in the broker to take care that the copies should correspond. I think I must still act upon that opinion, and refuse the evidence.(a)

It afterwards appeared in evidence, that after the delivery of the goods, and before the payment, according to the terms of either copy of the contract, was to be made, it was agreed by the plaintiffs and the brokers that the payment of half the price should be advanced ten days, and the payment of the remainder postponed for the same time; and the broker did accordingly pay the first half at the accelerated time, and failed before the substituted time for paying the remainder. This arrangement was made without the defendant's knowledge; on which, when *Scarlett* had commenced his address to the jury,

ABBOTT, Ld. C. J., interposed, saying, that the plaintiffs had thereby taken the brokers as their debtors, and nonsuited the plaintiffs.(b)

Marryatt and *Dodd* for the plaintiffs.

Scarlett and *Campbell* for the defendant.

(a) See *Goom v. Alfalo*, 6 B. & C. 117.

(b) See *Kymer v. Suwercrop*, 1 Camp. 109; *Blackburn v. Scholes*, 2 Camp. 343; *Campbell v. Hassel*, 1 Stark. 233.

CLAY v. LANGSLOW and Others.—p. 45.

On a plea in abatement of the non-joinder of A. B. as a defendant, his declarations made before action brought are evidence in support of the plea.

ASSUMPSIT for work and labour. Plea in abatement of the non-joinder of eighteen others.

The defendants were members of a company, called "The Ægis Fire and Dilapidation Company." The plaintiff had printed hand-bills, &c., for the Company, and brought this action for the amount of his bill.

To prove that one Verbeke, one of the persons named in the plea in abatement, was a joint contractor, it was proposed to give evidence of his declarations, made before action brought, that he was a holder of shares in the Company: and on objection made,

ABBOTT, Ld. C. J., received the evidence, saying: Whatever, in an action brought against him as a proprietor, could be evidence to prove him one, may be received on this issue to prove him to be one.

The defendants failed in proof of other persons being liable, and the plaintiff had a verdict.

Scarlett and *Perring* for the plaintiff.

Tindal, S. G., *Campbell*, and *Park* for the defendants.

EAST v. CHAPMAN.—p. 46.

[S. C. 2 Carr. & P. 570.—12 E. C. L. R.]

In an action for a libel, purporting to be a report of a coroner's inquest, evidence of the correctness of the report is admissible under the general issue, in mitigation of damages; but no evidence of the truth or falsehood of the facts stated at the inquest is admissible on either side.(a)

(a) The same point was ruled by Lord Tenterden, C. J., in *Thomas v. Newton*, Westminster Sittings after Easter Term last. This was an action on a bill of exchange. The defence was, that the bill had been given on a stock-jobbing transaction, and the broker who made the bargain was called as a witness for the defendant. In the course of his evidence after the same point as that in the principal case had occurred, *Chitty*, who was counsel for the plaintiff, objected that a particular question related to a matter on which the witness had claimed his privilege, and that he was not bound to answer it.

Lord TENTERDEN, C. J., said, that the objection belonged to the witness, and would not allow the counsel in the cause to argue it.

If a witness answers any questions on a matter rendering himself liable to forfeiture or punishment, he cannot afterwards claim his privilege, but must answer throughout.

The counsel in a cause have no right to object, in favour of a witness, that the answer to a particular question renders him liable to punishment or forfeiture. Such objection belongs to the witness only.

THOMPSON and Another v. FARMER.—p. 48.

If A., holding B.'s goods with a lien on them against B., transfer them to C., C. cannot hold them against B. to the extent of A.'s lien under the fifth section of the 6 G. 4, c. 94, unless the transfer be expressly made as a pledge.

TROVER for safflower.

In the month of October, 1825, the plaintiffs being desirous of obtaining an advance of money, applied to Messrs. Humpleby and Tart, who then held some East India warrants for the safflower, which they had purchased for the plaintiffs as their factors. These latter accepted bills drawn by the plaintiffs; and, to cover these acceptances, the plaintiffs agreed that Messrs. Humpleby and Tart should retain the East India warrants. The plaintiffs, when the bills became due, furnished Messrs. Humpleby and Tart with fresh bills, in order to enable them to take up the old ones. Before the maturity of these last bills, Messrs. Humpleby and Tart failed. The plaintiffs then ascertained that the East India warrants were in the hands of the defendant, who had become possessed of them under the following circumstances:—On the 30th of January, 1826, Humpleby made out a bought and sold note for them, in which the sale was stated to have been made by one Todhunter to the defendant, at the rate of 7*l.* per cwt.; and on the next day they were sold by Humpleby to Tart, for the defendant, at 7*l.* 10*s.* per cwt. The defendant, however, retained possession of them, as the price of the sale by himself had not been paid. The defendant, at the time of the first sale, had understood, by a letter from Humpleby, that the latter would resell at 7*l.* 10*s.*

The counsel for the defendant contended that these warrants had come to the defendant either by a sale which was fair as regarded him, or as a pledge from Humpleby. In the former case, the defendant would be entitled to retain them, according to the principle in *Zwinger v. Samuda*, 7 Taunt. 365, and 1 B. Moore, 12: in the latter, the defendant would be entitled to hold the goods as a lien, to the extent of Humpleby's claim on the plaintiffs, under the provisions of the fifth section of st. 6 Geo. 4, c. 94.(a)

For the plaintiffs it was replied, that the provisions in the statute could only refer to a pledge made distinctly as such; but the present transaction was a sale, either fraudulent or fair.

ABBOTT, *Ld. C. J.*, was at first inclined to consider that the statute was applicable; but finally expressed his opinion decidedly, that the case was without its provisions, on the ground suggested on the part of the plaintiff. He therefore left it to the jury, whether the defendant had, at the time of the sale to him, reasonable ground for suspecting that Humpleby was defrauding his employers; directing them, if they were of that opinion, to find the plaintiffs; but otherwise, for the defendant.

Verdict for the plaintiffs.

The *Solicitor-General* and *Pollock* for the plaintiffs.

Scarlett and *Marryatt* for the defendant.

(a) There is no section of the statute, except the fifth, which could possibly be applicable to the case; for the first section only applies to persons intrusted with goods for the purpose of sale, or whose names have been used by the real owner, for his own convenience, in the transmission of the goods; and the second section, as to the rights of persons possessed of bills of lading, India warrants, &c., and the fourth, as to contracts with known agents in the ordinary course of business, did not come into operation till Oct. 1, 1826, after all the transactions in this case were at an end.

FENWICK and Others, Assignees of DEVEY, v. THORNTON.—p. 51.

The declarations of a party suing as assignee of a bankrupt, made before he became such, are not admissible against him.

TROVER. The defendant having offered evidence of an admission made by one of the plaintiffs before he was appointed assignee,

The counsel for the plaintiffs objected that this could not be considered as an admission in the present case. The character, in which alone the persons making the admission appeared here, did not exist at the time of the admission being made.

ABBOTT, Ld. C. J. What the assignees say in their own persons, does not affect this case. You cannot confound plaintiffs of this sort with plaintiffs in their own character.

His Lordship accordingly rejected the evidence. Verdict for the plaintiffs.

Scarlett, Gurney, and Perring for the plaintiffs.

Campbell and Holt for the defendant.

S. P. as to prochein amy, *Webb v. Smith*, R. & M. N. P. C. 106.

SITTINGS IN AND AFTER HILARY TERM, IN C. P.

8 GEO. IV.—1827.

DEWEY v. WHITE and Others.—p. 56.

A stack of chimneys belonging to a house close to a highway, which, by reason of a fire, were in immediate danger of falling on the highway, were thrown down by some firemen. Held, that they were justified in so doing, and were not answerable for damages unavoidably done to an adjoining house of a third person.

THIS was an action of trespass for forcing and throwing a stack of chimneys upon the roof of the plaintiff's house, and damaging and injuring the same.

Pleas, not guilty; and a justification in substance that the chimneys were part of a house of one J. C., adjoining a highway in the parish of St. Andrew's, Holborn, and adjoining to the house of the plaintiff, and near to certain other houses; and that the house of the said J. C. was then recently damaged and consumed by fire; and the said chimneys were, by reason of the said fire, in a ruinous and dangerous state, and in great and immediate danger of falling in and upon the said highway, and in and upon the said other houses, and thereby of doing great bodily injury to, and destroying the lives of, His Majesty's subjects passing along the said highway, and inhabiting the said dwelling-houses; and it thereby became necessary, for the safety of his Majesty's said subjects, immediately to remove the said chimneys; whereupon the said defendants did remove and throw down the said chimneys, and thereby did unavoidably damage the house of the said plaintiff. Replication, de injuria, &c., and issue thereon.

The defendants were firemen belonging to the British Fire Office; and the houses of J. C. and of the defendant adjoined a frequented thoroughfare for foot passengers in Holborn.

Upon the plaintiff's counsel contending that the plea, if made out, was no defence to the action,

BEST, C. J., said, That question is upon the record; but I have no hesitation in declaring my opinion now, that the plea, if made out, is a good answer to the action. In analogy to the doctrine of nuisances, and the cases of captains of ships throwing overboard the cargoes to save the lives of the crews, I think it

was the duty and right of these defendants to remove these chimneys, and to prevent their remaining to endanger the lives of His Majesty's subjects.

The trial proceeded, and the defendants obtained a verdict, in which the plaintiff acquiesced.

Taddy, Serjt., and *D. Pollock*, for the plaintiff.

Vaughan, Serjt., and *Brodrick*, for the defendant.

HOGARTH and Others v. JACKSON and Others.—p. 58.

[S. C. 2 Carr. & P. 595. 12 E. C. L. R. 753.]

By the custom of the Greenland whale-fishery, the first striker is entitled to the fish, though his harpoon be detached from the line when the second striker strikes, if the fish be so entangled in his line that he might probably have secured her without the interference of the second striker.

If while the fish is fast to the harpoon of the first striker, another comes up unsolicited and so disturbs the fish that she breaks from the first harpoon, and then he strikes her with a harpoon himself and secures her, the fish continues the property of the first striker.

TROVER for a whale.

The plaintiffs, who were the first strikers, gave evidence of the custom of the Greenland fishery, varying from that stated in *Littledale v. Scaith*, 1 Taunt. 243, n.; and contended that the custom was that the whale continued the property of the first striker, not merely while the harpoon continued in the fish, and the line attached to it, but although the harpoon had come out of the fish, or had been detached from the line, if the fish were *entangled* in the line, and the line continued in the power or management of the striker. This custom was, to a certain extent, proved in evidence, and admitted on the part of the defendants; the only question between the parties being this, that the defendants denied the fish to be *entangled*, within the meaning of the custom, unless she were so fast in the rope as to give the first strikers the same power over her as if the harpoon continued fixed; while the plaintiffs contended, that if the rope, which continued in the power of the strikers, was any how attached to the fish, the fish was a fast fish, and belonged to the first strikers.

On this point the evidence was indecisive; but it appeared that, in the particular case, the whale was so far entangled in the rope of the first harpoon, when the second was struck, that she afterwards carried out 250 fathoms of rope, with such velocity, as to endanger the burning of the rope: on which *BEST*, C. J., expressed his opinion that the custom as proved, if understood to extend to all cases where the whale was so far *entangled* in the rope of the first strikers, that they might thereby have a reasonable expectation of securing her, was more reasonable than that stated in *Littledale v. Scaith*; and the jury, which was special, found for the plaintiffs.

Wilde and *Spankie*, Serjts., and *Chitty*, for the plaintiffs.

Taddy, Serjt., *Brougham*, and *Alderson*, for the defendants.

In *Skinner and Others v. Chapman and Others*, Ex relatione *Alderson*, tried at York, at the Lent Assizes, 1827, which also was an action of trover for a whale, the same law was stated with respect to friendly harpoons, but the case turned upon another question. It appeared, that while the fish was unquestionably fast, the boat of the defendants came up, and the crew struck the fish with a lance; they afterwards struck it with a harpoon, and finally secured it. The blow with the lance was of no service towards securing the fish, but it made it struggle violently, and in the struggle the harpoon of the plaintiffs was disengaged; but it did not clearly appear whether this took place before or after the harpoon was struck by the crew of the defendants. *Bayley*, J., left it to the jury to say whether the harpoon of the plaintiffs was fast when the harpoon of the defendants was struck; and, if they thought it was not, whether the plaintiffs could have secured the fish if the lance of the defendants had not been struck; saying, that he was clearly of opinion that when one party has struck an animal, if another comes unsolicited, does an act which prevents the first striker from killing it, and then kills it himself, he kills it, not for his own benefit, but for that of the first striker.

The jury found, that the fish was loose when the harpoon of the defendants was struck; but

that she had become so in consequence of the blow given by their crew with the lance; on which the verdict was entered for the plaintiff.

Scarlett, Alderson, and Parke, for the plaintiffs.

J. Williams and Creswell for the defendants.

SITTINGS IN AND AFTER EASTER TERM, IN K. B.

8 GEO. IV.—1827.

GEILL v. JEREMY and Another.—p. 61.

A party receiving notice of dishonour of a bill of exchange need not give notice to the party above him till the next post after the day on which he himself receives the notice, although he might easily give it that day, and there is no post on the day following.

ASSUMPSIT by the endorsee of a bill of exchange against the drawer.

The only question was, as to the regularity of the notice of dishonour. The plaintiff, who lived near Chorley in Lancashire, received notice of the dishonour, by the post, at nine o'clock in the morning of Thursday, August 31. The post left the village where he resided at six that evening, and the mail-bags were not made up at Chorley (two miles off) till nine in the evening. The plaintiff did not write by that post, which would have arrived in London, to which his letter was to be addressed, on Saturday; and there being no post to London on the Friday, he did not write till the Saturday.

Storks, for the defendants, contended that this notice was insufficient. In *Darbishire v. Parker*, 6 East, 3, it was doubted whether the notice should not always be sent by the very next post, if that were possible; and though subsequent cases^(a) have laid down the rule that the post of the next day is in all cases sufficient, there is no instance in which it has been decided that the party is entitled to make a delay of two days, when he might, by ordinary diligence, avoid it. In this case he might, with perfect ease, have written on the Thursday, and was therefore not entitled to wait till the Saturday.

Lord TENTERDEN, C. J. In these cases it is of great importance to have a fixed rule, and not to resort to nice questions of the sufficiency, in each particular case, of a certain number of hours or minutes. The general rule is, that the party need not write on the very day that he receives the notice. If there be no post on the following day, it makes no difference: the next post after the day on which he receives the notice is soon enough. Verdict for the plaintiff.

Marryatt and Chitty for the plaintiff.

Storks for the defendant.

(a) *Scott v. Lifford*, 9 East, 347, 1 Campb. 246; *Langdale v. Trimmer*, 15 East, 291; *Bray v. Hadwon*, 5 M. & S. 68; *Williams v. Smith*, 2 B. & A. 496; *Wright v. Shawcross*, 2 B. & A. 501, n.; *Bancroft v. Hall*, 1 Holt, N. P. C. 476.

ROGERS v. HUNTER.—p. 63.

[S. C. 2 Carr. & P. 601. 12 E. C. L. R. 756.]

If a bill of lading stipulate for the payment of demurrage by the consignee of goods after a limited time from the ship's arrival, and his goods are so stowed as not to admit of delivery immediately on arrival, the consignee must have a reasonable time to discharge them, and is not liable to demurrage till after such reasonable time, though the stipulated period has elapsed from the ship's being ready to deliver her cargo generally. But after such reasonable time, he is liable, though the stipulated period has not elapsed, if computed from the time when the discharge of his own goods might have commenced.

ASSUMPSIT for demurrage.

The plaintiff was master of the ship *Thyrza*; and took on board at Bremen, a consignment of corn for London, for which he signed bills of lading, containing the following clause as to the discharge of the cargo: "To be discharged within twelve running days after the vessel's arrival, or to pay 2*l.* British sterling demurrage for every day longer detention." The defendant was the consignee of the corn comprised in the bill of lading.

The *Thyrza* arrived and was reported on the 11th of December, 1826, and was ready to commence the discharge of her cargo on the 13th; and on the 14th the clearance of the cargo actually commenced. The defendant was at this time ready to take his corn; but the ship containing other consignments, which were stowed above his, his corn could not be got at till the 26th December, when he received notice that it could be got, and was desired to remove it. He commenced the removal on the 28th, and did not finish it till the 2d January, 1827, twenty days after the ship was ready to commence the delivery of the cargo.

Marryatt, for the defendant, contended that the plaintiff could not recover anything. The period from which the demurrage is to be computed is that when the ship is ready to discharge her cargo (per Gibbs, C. J., in *Harman v. Mant*, 4 Campb. 161), not that of her actual arrival; and here, as far as the defendant was concerned, that period was not till December 26, for it was not till that day that his part of the cargo could be got at, and he has nothing to do with the arrival and delivery of the rest. Then, as he did actually clear away his corn within the stipulated period of twelve days from thattime, he fulfilled his contract, and is not liable to this action.

The *Attorney-General* for the plaintiff. The argument for the defendant would have applied equally well in the case of *Leer v. Yates*, 3 Taunt. 387.(a) In that case the bill of lading contained a stipulation for the delivery, just like that in the present; and there also the goods in question could not be got till after the discharge of another part of the cargo, and that was not discharged in time; but the Court of Common Pleas held the consignee of the lower goods liable to demurrage for the whole time beyond the stipulated period. So here the plaintiff is entitled to 16*l.*, as demurrage for the eight days of excess above the stipulated twelve.

Lord TENTERDEN, C. J. According to the doctrine laid down in that case, he certainly is so; but I have great difficulty in saying that, when the consignee has had no opportunity of taking his goods within the time stipulated, he is bound by the contract to pay for not doing so; he cannot, I think, in that case, be said to detain the vessel. On the other hand, I do not agree to the proposition on the part of the defendant, that he has necessarily the stipulated time, to be computed from the period when the discharge of his own goods can be commenced; I think, after that period, he must use reasonable despatch. The true principle seems to be this: If the goods of the particular consignee are not ready for discharge at the time of the ship's arrival, he must have a reasonable time for removing them after they are so; if, in such a case, using reasonable despatch, he cannot clear them within the stipulated period from the ship's being ready to discharge her cargo generally, he will not be liable for demurrage till the expiration of such a reasonable time; but when it is expired, he will be liable though the stipulated period, if computed from the time when the discharge of his own goods could have commenced, is not at an end. In the present case the discharge of the defendant's goods might have begun on December 26th, and every day after that time was more than the stipulated twelve days from the time when the discharge of the cargo generally began. The question for the jury, therefore, will be, Whether the defendant, using reasonable despatch, might have removed his goods before the 2d of January? if he might, the plaintiff is entitled to receive at the rate of 2*l.* a day for the time unnecessarily consumed.

Verdict for the plaintiff, damages 8*l.*

(a) See also *Harman v. Gandolph*, 1 Holt, N. P. C. 35.

Scarlett, A. G., and Platt for the plaintiff.
Marryatt for the defendant.

BENTLEY and Another v. NORTHOUSE.—p. 66.

A foreign note is negotiable in England by endorsement, by virtue of the stat. 3 & 4 A. c. 9.^(a)
 A promissory note is not admissible in evidence under the money counts in an action by the endorsee against the maker.^(b)

ASSUMPSIT by the endorsee against the maker of a promissory note.

The note was made in Scotland; and *Chitty* for the defendant, contended that it was not negotiable or transferable by endorsement. The power of transferring promissory notes, like bills of exchange, by endorsement, was created by the statute 3 and 4 Anne, c. 9, and has no existence independently of that statute; and that statute having been passed before the Union, had no operation on notes made in Scotland. It is true that in some of the stamp-acts there have been clauses restraining the negotiability of foreign notes not stamped according to their provisions; but such clauses cannot create a power of negotiation not otherwise existing; and although instances may be cited where parties have been allowed to recover on foreign promissory notes, they are of little importance unless the objection appears to have been made. In the case of *Carr v. Shaw*, Bayley on Bills, 4th edit. p. 22, the objection was made, and then the Court of King's Bench intimated a strong opinion in favour of it; although, the action being between the immediate parties to the note, the plaintiff was allowed to recover on the money counts. Here he cannot do so, for he is an endorsee, and the action is against the maker.

Lord TENTERDEN, C. J. That circumstance prevents the plaintiff from recovering on the money counts; but I think he is entitled to recover on the note itself. It is true that the statute 3 and 4 Anne, c. 9, being made before the Union, only regulated the laws of England, and left those of Scotland unaffected. But there are no words in the statute to confine its operation in England to notes made there: it speaks generally of promissory notes, and enacts that they shall be assignable or endorsable over in the same manner as inland bills of exchange. The words, "as inland bills of exchange," which are the only words in the statute referring to any local distinction, apply only to the manner of transferring and enforcing the notes, not to the sort of notes contemplated by the act. Within the jurisdiction of the act, therefore, that is, in England, all notes are transferable by endorsement; and the plaintiff, as endorsee, is entitled to recover.

The cause had been set down for trial at the sittings in Easter term, as an undefended cause, but was postponed till the present sittings, the defendant undertaking to give judgment of Easter term. *Chitty* applied to have the judgment postponed to Trinity term, to give him the opportunity of moving, but Lord TENTERDEN refused the application, saying, that he had no doubt on the question, and could not act as if he had.

Verdict for the plaintiff, with judgment of Easter term.

Busby for the plaintiff.

Chitty for the defendant.

(a) S. P. Milne v. Graham, 1 B. & C. 192; where, however, *Carr v. Shaw* does not appear to have been cited. *Chitty on Bills*, 7th edit. 327.

(b) S. P. Wayman v. Bend, 1 Campb. 175. Contra, *Kessebower v. Tims*, Bayley on Bills, 4th edit. 288 n. See also Bayley on Bills, pp. 286—289, and *Chitty on Bills*, 7th edit. pp. 363—367, where the cases on this subject are collected.

AITKEN v. BEDWELL.—p. 68.

The commander of an English merchant ship lying in a port of a foreign state, sent a seaman, who had committed mutiny on board the ship, ashore, in custody of the soldiers of the port, and procured him to be flogged and imprisoned by the local authorities: Held, that the captain was answerable in trespass for what was done on shore, he having taken an active part in instigating and promoting the proceedings.

TRESPASS for beating, flogging, and imprisoning the plaintiff.

The declaration contained several counts.

Pleas, 1st, Not guilty. 2dly, That the plaintiff was a seaman on board a certain ship called the *Symmetry*, of which the defendant was the commander, and that the plaintiff was guilty of mutiny and disobedience of the defendant's orders, wherefore the defendant imprisoned, &c., the said plaintiff on board the said ship. 3dly, As to the assaults on board the said ship, son assault demesne.

Replication, de injuria sua, &c.

It appeared in evidence, that whilst the ship was lying in the port of Odessa, the plaintiff and several others of the crew were drinking on board late at night; that upon the defendant's ordering the lights to be put out the plaintiff refused, and struck the defendant, and a disturbance of a mutinous character ensued. The defendant immediately sent on shore to the Russian commandant for some soldiers, and on their coming on board gave the plaintiff and two others of the crew into their custody. The men were taken on shore and thrown into a dungeon, where they were kept for several days without food, and a complaint and inquiry were made, in the absence of the plaintiff, by the defendant, before the commandant and the consul of the port. The plaintiff and the other men were then taken out of prison by the Russian officers and soldiers, thrown on a barrel and flogged, the defendant standing by, and ordering the punishment, and, throughout, taking an active part in the proceedings on shore.

The facts supported the pleas as to the assaults on board the ship; and it was contended by the *Attorney-General* for the defendant, that all that had taken place on shore was done under the authority of the Russian government, to whom the defendant had handed over the plaintiff; and evidence was offered to show that keeping the lights at that time of night was a breach of the Russian law; and he argued that, however contrary the proceedings on shore were to the English rules of law, the defendant was not answerable in trespass for them; all that was done being done by the local authorities over whom he had no control, and not by him.

LORD TENTERDEN, C. J., in summing up to the jury, said, The plaintiff contends that what was done on shore was the act of the captain, the defendant says it was the act of the Russian authorities only. The question for you is, Whether the punishment inflicted on shore was done by the constituted authorities, on the mere complaint of the defendant, or whether the defendant was the actor and immediate promoter of it? If you think the defendant merely preferred his complaint, and left the constituted authorities to act as they thought fit, the defendant is entitled to your verdict; if, on the other hand, you think he did more, and was active in promoting and causing the punishment to be inflicted, then he is answerable in this form of action.

Verdict for the plaintiff on the general issue, 25*l.* damages.

Platt for the plaintiff.

Scarlett, A. G., and *Bolland* for the defendant.

READING v. BARNARD.—p. 71.

An account of the expenses of rebuilding a party-wall, delivered in pursuance of the statute 14 G. 3, c. 78, § 41, containing a correct statement of the quantity of brick-work done and

materials allowed for, is a sufficient account, as required by that section, although it also contains a statement of the prices paid for the brick-work and allowed for the materials, which exceed the prices fixed by the statute; and a demand for payment, referring to that account, is sufficient.

The defence relied on, being that the party-wall was not built half on each side of the boundary, as required by § 14 of the act: Held, that the question for the jury was, Whether it were fairly built so, without regarding any minute inaccuracy of measurement, or by unfairly and intentionally encroaching on the defendant's premises?

ASSUMPSIT for contribution to the expense of rebuilding a party-wall.

The old party-wall was of insufficient thickness according to the provisions of the st. 14 G. 3, c. 78, and the plaintiff rebuilt it, and brought this action against the defendant, as owner of the improved rent of the adjoining premises, for his proportion of the expense. The account of brick-work done, of the deduction for materials, and of the other expenses of the alteration, had been delivered in due time, and payment demanded more than twenty-one days before the action brought, as is required by § 41 of the statute: but the account stated the prices actually paid for the brick-work, and received for the materials, which exceeded the rates prescribed by the act, and thus made the whole amount upwards of 80*l.* instead of 18*l.*, the sum which would have been due, if the statutable rates had been charged.

Marryatt objected that this was not a sufficient compliance with the act: the first builder is to deliver a true account, which is not the case, when he charges a higher price than he is entitled to demand; besides, he is to demand payment twenty-one days before he brings his action; and as the demand necessarily refers to the account delivered, and that is of a larger sum than he can recover, there has been no good demand of the compensation to which he is really entitled.

Lord TENTERDEN, C. J. All that the act requires is a true account of the number of rods in the party-wall, and of the deduction in respect of the materials. The act itself fixes the price to be paid and allowed in respect of them. If, therefore, the quantities are correctly stated, the party charged has the means of knowing the amount of the claim against him. There is, then, no necessity for, and the act does not require, any specification of the price; and the account will not be vitiated by the unnecessary insertion of a price which the party cannot be charged with. It is the same with respect to the demand; the party receiving an account of the quantity of work done, and of materials allowed for, must know, by reference to the statute, how much he is liable to pay, and a demand to pay the account is, in effect, a demand to pay that sum. It is evident that the demand need not be in terms a demand of the exact sum; for after empowering the plaintiff to proceed at law in the common case, the same section of the statute proceeds to enact, that where a demand is made at the time and in the manner there prescribed for that purpose, the plaintiff, if he recover the full sum specified, shall also recover double costs.

Evidence was then given to show that the wall having been originally of insufficient thickness, the plaintiff in rebuilding it had taken the whole space requisite for the additional thickness from the defendant's premises, so that the wall, instead of standing equally on the premises of both (as prescribed by s. 14), was fourteen inches on the defendant's and only four on the plaintiff's premises; and it was contended that as no persons were entitled under the provisions of the 14 G. 3, c. 78, except those at whose expense party-walls were built, *agreeably to the directions of that act*, the plaintiff could not recover for a wall built by an encroachment on the defendant's land.

For the plaintiff it was answered, that no such complaint had been made during the building, and that at all events it furnished no defence to this action, but was matter for an action of trespass; and evidence was given to show that the centre of the wall was correctly on the boundary line of the premises.

Lord TENTERDEN, C. J., in summing up to the jury said, the act certainly requires that the wall should be built half on the premises of one, and half on those of the other owner, and the first builder is only entitled to recover if he

builds agreeably to the directions of the act. I should, however, have great difficulty in holding that a party, who having had due notice, as he must, of the intended alteration, lay by and made no objection while the building was going on, could afterwards, if on minute measurement it turned out that the centre of the wall was not exactly on the boundary, defeat such an action as the present. On the other hand, if the alteration was really effected by a complete encroachment, as, for instance, if all the additional thickness were taken out of the defendant's premises, that would be so complete a violation of the act that the plaintiff could have no remedy under its provisions. The question for you will be, whether, upon the evidence, you think the wall was fairly built half and half or unfairly built, and intentionally encroaching on the defendant's premises? In the former case, the verdict should be for the plaintiff, notwithstanding any minute inaccuracy in the measurement; in the latter, it should be for the defendant.

Verdict for the plaintiff.

Gurney and D. F. Jones for the plaintiff.

Marryatt and Comyn for the defendant.

See *Phillip v. Donati*, 2 Taunt. 62.

SOANE v. KNIGHT.—p. 74.

A fair criticism on the works of a professional artist, in the course of his professional employment, is not actionable, however mistaken it may be: if it is unfair and intemperate, and written for the purpose of injuring the party criticised, it is actionable.

CASE for libel. Plea, not guilty.

The plaintiff was an architect, and professor of architecture in the Royal Academy, and the declaration stated the alleged libel to be published concerning him in his profession. The alleged libel professed to give an account of the principles of a new order of architecture, called the Bæotian order of architecture, which it stated to have been invented by the plaintiff, whom it termed the Bæotian professor; and it set forth several very absurd principles as the rules of the new order, which it represented as collected by observation from buildings in which the new order had been employed, and which it illustrated by examples of such buildings, all the buildings instanced being the works of the plaintiff.

The *Attorney-General*, for the defendant, contended that the supposed libel was not actionable; that works of art were as much the legitimate subjects of criticism as the writings of an author; that in neither case ought a critic to be liable to an action for his remarks, however mistaken, unless he travelled out of the work he criticised, for the purpose of slandering the author in his personal character; and that in the case of literary criticism this doctrine had been expressly laid down by Lord Ellenborough in the case of *Carr v. Hood*, 1 Campb. 354, n.

Lord TENTERDEN, C. J., in summing up to the jury, said, this publication professes in substance to be a criticism on the architectural works of the plaintiff. On such works, as well as on literary productions, any man has a right to express his opinion, and however mistaken in point of taste that opinion may be, or however unfavourable to the merits of the author or artist, the person entertaining it is not precluded by law from its fair, reasonable, and temperate expression. It may be fairly and reasonably expressed, although through the medium of ridicule. In the present case the censure is certainly strong, nevertheless, if you think the criticism fair, reasonable, and temperate, although it may not be correct, the defendant will be entitled to your verdict; if you think it unfair and intemperate, and written with the intention and for the purpose of injuring

the plaintiff in his profession, by imputing to him that he acts on absurd principles of art, you will find for the plaintiff. Verdict for the defendant.(a)

Gurney, Brougham, Denman, C. S., and Platt, for the plaintiff.

Scarlett, A. G., and Hill, for the defendant.

(a) See *Dunne v. Anderson*, R. & M. N. P. C. 287.

SITTINGS AFTER TRINITY TERM, IN K. B.

8 Geo. IV. 1827.

DOE d. CHIPPENDALE and Others, v. DYSON and Another.—p. 77.

In ejectment on a clause of re-entry for non-payment of rent, if the landlord shows that he was prevented by the defendant from entering on the premises to distrain, he is entitled to recover, under the stat. 4 G. 2, c. 28, s. 2, without showing that there was actually no sufficient distress on the premises.

PAGE v. MANN and Another.—p. 79.

Proof of the handwriting of the subscribing witness to an instrument is sufficient, he being dead, without any further proof of the identity of the parties, except the identity of name and description.

ASSUMPSIT for use and occupation.

The defendants took possession under an agreement for a lease. The subscribing witness to the agreement was dead; but proof was given of his handwriting.

The *Attorney-General* objected that this was insufficient without proof of the handwriting of the defendants, or some proof, at least, that they were the parties whose signature the witness had attested. This was the opinion of Bayley, J., in *Nelson v. Whittal*, 1 B. & A. 19, and is the only reasonable rule.

Lord TENTERDEN, C. J. The practice has been otherwise: I have myself frequently admitted such evidence as sufficient. I think I ought to abide by what I have hitherto done; if I am wrong I may be corrected.

The handwriting of the defendants was afterwards proved; but the plaintiff was finally nonsuited on another point, with leave to move to enter a verdict

Campbell and Chitty for the plaintiff.

Scarlett, A. G., and Marryatt, for the defendant.

WYATT v. CAMPBELL.—p. 80.

In an action by the endorsee against an endorser of a bill of exchange, where the defendant proves usury in the connection, or in a previous transfer of a bill, the plaintiff must prove himself a bona fide holder, though he has received no notice to prove consideration.

THIS was an action by the endorsee against an endorser of a promissory note. The defence was, that the note had been discounted by a previous endorser for an usurious consideration.

The defendant failed in proving notice to the plaintiff, to prove the consideration of the endorsement to him; and *Thesiger* contended, that he was not bound to prove consideration, although there might have been usury in a previous transfer.

Lord TENTERDEN, C. J. The stat. 58 G. 3, c. 93, makes a note tainted with usury valid in the hands of a bona fide holder; the onus, therefore, is upon the holder to prove he is such, otherwise the statute does not apply, and the note is void under the statute of Anne.

The plaintiff did not establish the consideration, and the defendant obtained a verdict.

Thesiger for the plaintiff.

Gurney for the defendant.

CRERAR v. SODO and COLLINGWOOD.—p. 85.

[S. C. 3 Carr. & P. 10.—14 E. C. L. R. 424.]

Where the counsel for the defendant opens facts to the jury, and calls no witness to prove them, it is in the discretion of the Judge to allow the plaintiff's counsel to reply.

If a defendant prove payment to a plaintiff, by showing the particulars of demand, delivered under a Judge's order, in which the plaintiff has credited the defendant, this is the evidence of the defendant, and entitles the plaintiff to reply.

ASSUMPSIT for work and labour.

The defendants' counsel having opened facts, to prove which no witness was called, the plaintiff's counsel insisted on the right of reply. The defendants' counsel resisted this, except on condition of the facts being admitted as proved.

Lord TENTERDEN, C. J. If the defendants' counsel refuse to call a witness to establish the facts which they have undertaken to establish, the Judge may, in his discretion, permit a reply; but as to the strict right, the practice is clearly against it.

The defendants' counsel afterwards put in the rule for payment of money into Court, and the plaintiff's counsel was allowed to reply without further objection. (a)

Verdict for defendants.

Campbell and *R. V. Richards* for the plaintiff.

The Attorney-General and *Tomlinson* for the defendants.

(a) The right of reply came a good deal into discussion at the Lancaster Lent assizes, 1827, in the case of *Rymer v. Cook and Another*, with a note of which we have been favoured by a gentleman of the bar. That was an action of assumpsit. Plea, general issue. In order to prove part payment, the defendants relied upon the particulars of demand, which had been given under a Judge's order, and in which the plaintiff had given the defendants credit for certain sums paid.

The plaintiff's counsel insisted upon the right to reply. The particulars of demand must be considered as being put in by the defendants, just as if the latter had endeavoured to give evidence of admissions made in any other form. In fact, they can only become admissions by the defendants admitting the other side of the account.

The defendant's counsel contended that the particulars were not the defendant's evidence. Payment of money into court requires no proof.* In the same way the particulars, having been given in under the Judge's order, are as much part of the proceedings in the cause as the declaration or plea. There is nothing left for the jury to consider: for the items in the particulars really amount to no more than explanations of the complaint in the declaration, and should therefore be taken as forming part of the declaration.

Starkie, as amicus curiæ, mentioned the case of *Brown v. Watts*, 1 Taunt. 353, as tending to show that the particulars delivered under the Judge's order were, in fact, limitations, and a constituent part of the declaration.

HULLOCK, Baron. This is not like a payment of money into court. I should have received

* In consequence of the agitation of this question, as to the payment of money into court, the Court of Common Pleas, on February 8, 1810, promulgated a rule, that the production by the defendant of the rule to pay money into court should not give the plaintiff the right of reply, upon the ground that the court, if the plaintiff should take a verdict for the whole demand, without giving credit for the sum so paid in, would set it aside, without requiring evidence of the existence of the rule. See 2 Taunt. 267. The reason here assigned for the rule promulgated appears to distinguish the question from that discussed in the principal case.

the evidence of the admission, without proof of the Judge's order, on proof of the handwriting of the plaintiff's attorney. Therefore we may withdraw the Judge's order altogether; and then this becomes merely an admission, requiring proof, as other admissions do. I am certainly of opinion that it is the defendant's evidence, but I will consult my brother Bayley.

Mr. Justice BAYLEY (who was sitting on the criminal side) having expressed his assent to the opinion of the learned Baron, the plaintiff's counsel was permitted to address the jury in reply.

Verdict for the plaintiff.

F. Pollock and Patteson for the plaintiff.

J. Williams for the defendants.

VANDEWALL and Another v. TYRRELL.—p. 87.

A party to a bill of exchange is not liable for money paid to his use by a person who takes up the bill for his honour, unless formal protest of payment to his honour be made before payment of the bill.

THIS was an action of assumpsit for money paid by the plaintiffs to the use of the defendant.

The defendant, who resided in Jamaica, drew four bills, dated 9th September, 1824, for 1500*l.* on Willis & Co. in London, at nine months after sight. The bills were duly accepted, but were dishonoured and noted for non-payment at the time they became due, which was on the 30th July, 1825. The plaintiffs, on the request of the acceptors, paid the bills for the honour of the drawer on the 8th of August, 1825, and gave notice to the defendant the first foreign post. In May 1826, the notary public was instructed to protest the bill for non-payment, which he did. The protest purported to have been made before the payment, and in form asserted that the "plaintiffs were ready to pay for the honour of the drawer." He stated the custom to be, to protest formally before payment.

Lord TENTERDEN, C. J. The plaintiffs must be nonsuited: they sue upon the custom of merchants; that custom clearly is, that a formal protest should be made before payment is made for the honour of any party to a bill.

Nonsuit.(a)

Gurney and Platt for the plaintiffs.

Attorney-General and Chitty for the defendant.

(a) See Chitty on Bills, 7th edit. pp. 241, 567.

MULLETT v. HOOK.—p. 88.

The non-rejoinder of a secret partner cannot be pleaded in abatement.

ASSUMPSIT for goods sold and delivered.

Plea in abatement, that the promises, if any, were made with one Charles Chubb, now alive, and the defendant jointly.

Issue thereon.

It appeared in evidence, that the defendant and Chubb were partners; that the defendant, by himself, purchased the goods, but that they were really purchased for the joint account of the defendant and Chubb, though that was not known to the plaintiff, who trusted the defendant solely. The defendant ordered them to be sent to the place where the joint trade was carried on.

Parke, for the defendant, contended, on the authority of *Dubois v. Ludert*, 5 Taunt. 606, that it was immaterial what the understanding of the vendor had been at the time of the contract, for that the non-joinder of a dormant partner may be pleaded in abatement.

Comyn, for the plaintiff, insisted, that the only question was, with whom the contract was made, and that this depended entirely upon the representations made by the defendant at the time.

Lord TENTERDEN, C. J., directed the jury to find for the plaintiff, if they thought the sale was intended to be made to the defendant alone; for the defendant, if they thought the sale was intended to be made to the two.

Verdict for the plaintiff.

Lord TENTERDEN, C. J., addressed the defendant's counsel. If you think it worth while, upon consideration, I give you liberty to move to enter a nonsuit; but, though I entertain the highest respect for the learned person who pronounced that decision in the case of *Dubois v. Ludert*, I cannot help thinking that case has been disregarded, if not authoritatively overruled; and I cannot accede to the doctrine contained in it.

The defendant's counsel acknowledged that his impression was to the same effect, and no motion was afterwards made.

Comyn for the plaintiff.

Parke for the defendant.

S. P. Per Lord Kenyon in *Doo v. Chippenden*, in *Abbott on Shipping*, 5th edition, 96; and since, the case of *Dubois v. Ludert*, per Lord Ellenborough in *Baldney v. Ritchie*, 1 Stark. N. P. C. 338, and per Abbott, Ld. C. J., in *Stansfeld v. Levy*, 3 Stark. N. P. C. 8.

DOBSON v. SOTHEY and Others.—p. 90.

In a policy of insurance on premises of a certain description, "where no fire is kept, and no hazardous goods are deposited," these words must be understood of the *habitual* use of fire and deposit of hazardous goods. Where, therefore, the loss on such a policy happened in consequence of the making a fire and bringing a tar-barrel on the premises for the purpose of repairing them, it was held that the insured was entitled to recover.

ASSUMPSIT upon a policy of insurance against fire, against the defendants, three of the directors of the Beacon Insurance Company.

The policy was effected upon "a barn, situate in an open field, timber built and tile," at the premium of 1s. 6d. per 100l.

The conditions endorsed upon the policy required the insurer to deliver to the Company a description of the property to be insured, and provided that all insurances effected on property falsely described, so that the same might be charged at a lower rate of premium than would otherwise have been charged, should be void, and the premiums paid forfeited to the Company.

The rate of premium paid by the plaintiff was the lowest rate, and was only payable for buildings of a certain description, wherein no fire is kept, and no hazardous goods are deposited. There were other articles fixing a higher rate of premium for buildings of other descriptions, with the same proviso against hazardous goods; and a proviso that "if buildings of any description insured with the company shall, at any time after such insurance, be made use of to stow or warehouse any hazardous goods," without leave from the Company, the policy should be forfeited.

The premises were agricultural buildings, but not such as were strictly to be described as a barn; but they were of such a nature that they would have been insured by the Company at the same rate, if they had been more accurately described. They required tarring; and a fire was consequently lighted in the inside, and a tar-barrel was brought into the building, for the purpose of performing the necessary operations. In the absence and by the negligence of the plaintiff's servant, the tar boiled over, took fire, communicated with that in the barrel, and the premises were burnt down.

F. Pollock, for the defendant, contended, that the plaintiff could not recover; first, because the premises were incorrectly described as a barn; secondly, because the lighting a fire within the building was a contravention of the terms of the policy, which required that no fire should be kept in buildings on which the rate of insurance in the present case was paid; thirdly, that the tar-barrel came under

the description of hazardous goods, and therefore, that bringing it within the premises was also a breach of the conditions of the policy; and that all, or any of these circumstances, occasioned a forfeiture of the insurance.

Lord TENTERDEN, C. J., said, If the property insured has not been correctly described, the defendants certainly are not liable; but I do not think there is, in this case, any misdescription which will discharge them. The word "barn" is not the most correct description of the premises; but it would give the Company substantial information of their nature: there would be no difference in the risk, and the insurance would have been at the same rate, whether the word "barn" or a more correct phrase, had been used; I think, therefore, that they are substantially well described. Nor do I think that the other circumstances relied on furnish any answer to the action. If the Company intended to stipulate, not merely that no fire should habitually be kept on the premises, but that none should ever be introduced upon them, they might have expressed themselves to that effect; and the same remark applies to the case of hazardous goods also. In the absence of any such stipulation, I think that the condition must be understood as forbidding only the habitual use of fire, or the ordinary deposit of hazardous goods, not their occasional introduction, as in this case, for a temporary purpose connected with the occupation of the premises. The common repairs of a building necessarily require the introduction of fire upon the premises, and one of the great objects of insuring, is security against the negligence of servants and workmen. I cannot, therefore, be of opinion that the policy in this case was forfeited; and certainly, if it is valid, the circumstance that the fire happened through the negligence of the plaintiff's servant furnishes no answer to the action.^(a)

Verdict for the plaintiff.

Scarlett, A. G., Gurney, and Tomlinson, for the plaintiff.

F. Pollock and Patteson, for the defendants.

(a) *Austin v. Drew*, Holt. N. P. C. 126, 6 Taunt. 436.

LAWLER v. KERSHAW and Others.—p. 93.

A party paying a deposit on shares in a trading company, and afterwards signing the deed of partnership, is to be considered as a partner from the time of his paying the deposit. *Quære*, if the mere payment of the deposit, without the subsequent signature of the deed, would make him a partner?

ASSUMPSIT for goods sold and delivered.

The defendants were shareholders in the Devon and Cornwall Mining Company, and the demand was for stationary furnished to their office in London.

At a meeting held on the 7th of April, 1825, at which two of the defendants were present, it was agreed to establish the company, and all the defendants, except one, Barber, were named directors. Letters were sent to all the persons so named directors, announcing their appointment; and on the 16th April, all the defendants, including Barber, paid an instalment upon their shares. The deed was not executed by the defendants till after the last of the goods supplied by the defendant had been delivered; but after that time, Barber and all the other defendants except one, who was otherwise fixed, signed it.

Part of the goods were furnished on the 11th, 12th, and 13th of April; and the rest after the 16th.

The *Attorney-General*, for the defendants, contended, that they were entitled to a verdict, there being no evidence to fix the defendant Barber with any contract. No person, who comes into a partnership, is thereby made liable for the debts due from the firm before he joined it; and the question, therefore, is, when Barber became a partner. He was clearly a partner from the time he signed the deed; but then all the goods had been furnished, and he was no partner until then. It is true that he had paid a deposit on his shares, but that is not suffi-

cient. A man can only be liable as a partner, either because he is really interested as such, or because he holds himself out as such, and gives the firm the credit of his name. The payments on April 16th were not of public notoriety, and the parties making them could not be liable, therefore, on the latter ground; nor could they on the former, for they did not, by those payments, acquire any interest in the property or adventures of the company. They might, perhaps, have an equitable right to compel any of the adventurers, who then held the mines, to convey to them their proportions of them; but until that was done, they had no interest in them, and consequently could not, till then, become partners on the score of such interest. At all events none of the partners can be liable for the goods furnished before the 16th of April, when they made their payments.

Lord TENTERDEN, C. J. There appears in this case to have been a preliminary meeting, attended by some of the defendants, where all the defendants, except Barber, were named as directors; and that nomination was communicated to the parties named. They cannot be liable as partners for demands accruing before they became such, and they cannot be rendered partners by the act of others: the plaintiff, therefore, cannot recover against them for anything furnished before they assented to their appointment. There is no evidence of any such assent before the 16th; but on that day, they pay their deposits, after having received notice of their appointment; and that is a good recognition of their character, and for all goods furnished after that time they must be liable, unless there is a deficiency of evidence against Mr. Barber, who stands in a different situation from the others. He was not a director at any time during the supply of these goods; and the evidence against him is only that he paid his deposit on the 16th April, and that at a period after all the goods were supplied, he signed the deed of partnership. A question has been raised, whether the mere payment of his instalment is sufficient to constitute him a partner; but I think I am not called on in this case to decide that point. There is another fact here, that after the payment Mr. Barber executed the deed. I think that is a good recognition of his former payment as a transaction connected with the partnership, and shows that in making it he considered himself as becoming a partner; and, consequently, taking the two facts together, and not inquiring what might have been the effect of the payment standing singly, that Mr. Barber, in this case, was clearly a partner from the period when it was made.

Verdict for the plaintiff for the goods supplied after the 16th.

Gurney and Chitty for the plaintiff.

Scarlett, A. G., Campbell, F. Pollock, Patteson, and Perring, for different defendants.

LEVY v. BAKER.—p. 106.

THIS was an action for goods sold and delivered, and money lent: and it was proved that at the time of the transactions the defendant was manifestly insane; and ample evidence was given of fraudulent advantage taken by the plaintiff. BEST, C. J., after argument on the admissibility of the defence, left it to the jury to say whether the plaintiff, at the time he dealt with the defendant, knew of his insanity; if he did, it was a gross fraud, and the jury ought to find for the defendant. The jury found for the defendant.

Wilde, Serjt., and Stevens, for the plaintiff.

Merewether, Serjt., Coleridge, and Follett, for the defendant.

HIGHFIELD v. PEAKE.—p. 109.

An examined copy of a deposition in Chancery is admissible in evidence, for the purpose of contradicting the testimony of the same person when produced afterwards as witness.

THIS was an issue directed by the Master of the Rolls, to try the validity of a supposed deed of gift from one Joseph Ward, deceased, to the plaintiff, of an estate called Bowers. The defence relied on was, that the deed was a forgery by the plaintiff.

The plaintiff's brother was called to prove the execution of the deed by Ward, and minutely cross-examined as to the circumstances attending the execution; he had previously, in his deposition in Chancery, given a different account of those circumstances.

Campbell, in order to contradict the witness, proposed to read an office copy of the deposition, which had also been examined with the original deposition. The deposition had been read before the Master of the Rolls from another office copy.

Taunton objected that the copy could not be received. In *Rees v. Howell v. Bowen*, 1 M. & Y. 388, where Garrow, B., had received a copy of an affidavit, made for the purpose of obtaining an injunction, the Court of Exchequer held that the evidence had been improperly admitted, and ordered a nonsuit to be entered; and distinguished the case from that of *Hennell v. Lyon*, 1 B. & A. 182, and *Ewer v. Ambrose*, 4 B. & C. 25, where copies of answers had been admitted; saying, that those cases had gone to the extremity of the law, and they could not carry them any further; and that as they did not in terms apply to affidavits, they would not extend them to that case.

Campbell and *Russell*, Serjt., answered, that the decision in *Rees v. Bowen* proceeded on the particular circumstances of the case; that there was some doubt as to the identity of the party, and whether the affidavit had ever been used; and that *Hullock, B.*, intimated that an affidavit, which had been used, would stand on the same footing as an answer, and consequently that the case was not an authority in the present instance; and that the general rule was clear, that an examined copy of an answer or deposition in Chancery was admissible for all purposes, except on an indictment for perjury committed in them.

Taunton said, that there was here also want of strict proof that the deposition had been used; for the deposition read was from another office copy, and there was no proof that the two copies coincided.

LITLEDALE, J. There seems to be some doubt as to the precise statement of what passed in the Court of Exchequer, (a) (the report was not in Court), and, if the question is not concluded by that case, I am of opinion that the evidence is sufficient. I think that it would be so in any case, and it is more decidedly so here; for there is a case in *Burrow* (*Denn v. Lucas v. Fulford*, 2 Burr. 1179), where it was held that in the same Court, and same cause, an office copy is sufficient; and this being an issue out of the Court of Chancery, may be considered as a proceeding in that Court, and therefore the office copy would probably be evidence enough. In this case, however, it is an examined copy also.

Verdict for the defendant.

Taunton and *R. V. Richards* for the plaintiff.

Campbell and *Russell*, Serjt., for the defendant.

A new trial was afterwards moved for before the Master of the Rolls, on the merits, and refused; but no question was made as to the admission of the evidence above stated.

(a) Garrow, B., in that case questioned the authority of *Hennell v. Lyon*, and adverted to the circumstance of there being no proof that the affidavit had been used, but without expressing any opinion how it might affect the question. *Graham, B.*, thought the evidence insufficient, even if the affidavit had been used. *Alexander, C. B.*, was absent, and *Hullock, B.*, decided entirely on the ground that the affidavit did not appear to have been used.

HOLDER v. COATES, Gent., One, &c.—p. 112.

If a tree grows near the confines of the land of two parties, so that the roots extend into the soil of each, the property in the tree belongs to the owner of that land in which the tree was first sown or planted.

TRESPASS for cutting a tree of the plaintiff.

The plaintiff's land, and that of the defendant, adjoined each other, the plaintiff's land being rather the higher, and the separation between the two being by a hedge belonging to the plaintiff, and standing at the extremity of his ground, on the bank or declivity descending to that of the defendant. The trunk of the tree stood in the defendant's land, but some of the lateral or spur roots grew into the land of both parties; and evidence was given on the part of the plaintiff to show that there was no tap root, and that all the principal roots, from which the tree derived its main nourishment, were those which grew into the plaintiff's land. The defendant, on the other hand, gave evidence that there was a tap root, growing entirely in his land, and that the spur roots grew alike in the lands of both parties.

On the part of the defendant it was contended that, upon the evidence, the tree must be taken as belonging entirely to his land; but that, at all events, it derived part of its nourishment from his land, and that the plaintiff and defendant in that case would be tenants in common of the tree, according to the rule in the case of *Waterman v. Soper*, 1 Lord Raym. 737; (a) and in that case the action of trespass could not be supported.

LITLEDALE, J. There is another case on that subject (*Masters v. Pollie*, 2 Roll. Rep. 141), in which it was considered that, if a tree grows in A.'s close, though the roots grow in B.'s, yet the body of the tree being in A.'s soil, the tree belongs to him. I remember, when I read those cases, I was of opinion that the doctrine in the case of *Masters v. Pollie* was preferable to that in *Waterman v. Soper*; and I still think so. However, if the question becomes material, I will give you leave, on the authority of that case, to move to enter a nonsuit.

His lordship, in summing up to the jury, said, that with respect to any question which had been raised as to the proportion of nourishment derived by the tree from the soil of the plaintiff and defendant, he did not see on what grounds the jury could find for either party; but that the safest criterion for them would be, to consider whether, from the evidence given as to the situation of the trunk of the tree above the soil, and of the roots within it, they could ascertain where the tree was first sown or planted; if they thought it was first set in the land of the plaintiff, they would find a verdict for him; for the defendant, if the tree had originally been set in his. If they could form no opinion on this subject, he would afterwards give them his direction on the questions which they would then have to consider.

The jury saying that they could not tell in whose ground the tree first grew, a verdict for the defendant was taken by consent, on terms agreed on between the parties.

Russell, Serjt., and Whitcombe, for the plaintiff.

Campbell and Ludlow, Serjt., for the defendant.

(a) See also 2 Roll. Rep. 255, an anonymous case to the same effect.

The same difficulty and conflict of opinions has existed also in the civil law on this subject. In Dig. lib. xlvii. 7, 6, 2, we find, "Si radicibus vicini arbor aletur, tamen ejus est, in cujus fundo origo ejus fuerit;" a passage with some inaccuracy in the wording of the first part of the sentence, but which clearly corresponds with the doctrine held by Littledale, J.

On the other hand, in the Instit. lib. ii. 1, 31, we find, "Si vicini arbor ita terram Titii preserit, ut in ejus fundum radices egerit, Titii effici arborem dicimus: ratio enim non permittit, ut alterius arbor esse intelligatur, quam cujus in fundum radices egerit. Et ideo prope confinium arbor posita, si etiam in vicini fundum radices egerit, communis fit." And there is another passage to the same effect, and nearly in the same words, in Dig. lib. xli. 1, 7, 13. And the commentators on these different passages appear also to disagree on the question. In the new Code Civil of France, the difficulty has been avoided by a minute and careful legislation; the boundary hedges, and the trees in them are declared (Art. 670, 673) to be common property,

"mitoyens," except in certain cases; the planting of other trees within certain distances of the hedge is forbidden (by Art. 671), and if any are planted within these distances, the occupier of the adjoining land has the right of having them removed, and also of cutting the roots of trees growing into his land (by Art. 672). It is evident, therefore, that in the few cases where the question can now arise the rule would be substantially the same with that adopted in the principal case, by Littledale, J.

SITTINGS AFTER MICHAELMAS TERM, IN K. B.

8 GEO. IV.—1827.

HOPPER v. SMITH.—p. 115.

The counsel for the plaintiff has a right on the cause being called on to have a witness called on his subpoena without swearing the jury.

MEAGOE v. SIMMONS.—p. 121.

[S. C. 3 Carr. & P. 75. 14 E. C. L. Reports.]

It is usurious for the discount of a bill to engage with the holder that he shall pay to the agent procuring the discount a premium, though he himself retains only the legal discount.

THIS was an action by the endorsee, against the acceptor of a bill of exchange for 1000*l*.

The defence was that the bill had been usuriously discounted by the plaintiff through the agency of one Coates. It was clear on the facts, that Coates, who had procured the discount for De Lisle, the payee of the bill, had withheld from him 100*l*., by way of premium for procuring the discount. But it was doubtful whether the plaintiff had retained any part of this sum, or whether he was cognisant of the agreement between Coates and De Lisle, that anything beyond legal discount should be retained; the defendant endeavouring to make out that he was the agent and friend of the plaintiff; the plaintiff contending that he was the agent of De Lisle only.

Lord TENTERDEN, C. J., in summing up to the jury, said: I give my opinion in point of law most distinctly; that if the plaintiff caused this transaction to pass through the hands of Coates, in order that he might receive from De Lisle the premium over and above the regular discount, there is usury, and the plaintiff cannot recover, though he himself retained nothing beyond the legal discount. If he has engaged beyond the regular discount to himself, for Coates's benefit, that he should receive this payment, then the transaction is unlawful, and your verdict must be for the defendant. Verdict for the plaintiff.

Gurney and J. Parke for the plaintiff.

Scarlett, A. G., Chitty, and F. Kelly, for the defendant.

(a) See the cases collected in *Chitty on Bills*, 7th edition, pp. 78, 79.

WHITMORE v. BANTOCK.—p. 122.

In an action which had been set down for trial in the term as undefended, and postponed on the condition of giving judgment of the term, a plea puis darrein continuance of the defendant's bankruptcy and certificate (the certificate having been obtained since the term) is admissible.

WHEELER v. COLLIER.—p. 123.

On the sale of an estate by auction, the name of the owner did not appear in the particulars or conditions of sale, and the agreement signed by the purchaser did not mention the owner's name, and was not signed either by him or the auctioneer: *semble*, that the seller cannot maintain an action for the non-completion of the contract.

If the owner of an estate put up for sale by auction employ a person to bid for him, the sale is void, although only one such person be employed, and although he is only to bid up to a certain sum, unless it is announced at the time that there is a person bidding for the owner.

THIS was an action of assumpsit to recover damages for the non-completion of a contract to purchase a public-house, alleged "to have been sold by the plaintiff by public auction, by Messrs. Walters & Co., his agents, at which auction the defendant became and was the highest bidder and purchaser according to the conditions of sale."

The defendant was the highest bidder at the auction for the sum of 1610*l.*; and the printed conditions of sale were put in, with an agreement on the back, signed by the defendant at the auction, of which the following is a copy:—

"I do hereby acknowledge to have this day bought by public auction of Messrs. Walters & Co., as agents to Mr. _____, the leasehold estate comprised in this particular, for the sum of sixteen hundred and ten pounds, and have paid the sum of _____ as a deposit in part thereof; and do hereby agree to abide and conform to all the conditions of sale, as printed in this particular. Dated July 13, 1826.

"The goods, fixtures, and stock in trade, to be taken by valuation."

The printed conditions stated the sale to be by Walters & Co., as auctioneers, without mentioning the name of the plaintiff; nor did the agreement signed by the defendant, contain it, and no deposit was paid. It did not appear that the plaintiff's name was communicated as vendor, until demand was made on the defendant for the completion of the sale. Walters did not sign. One of the conditions was, that the purchaser should pay a deposit, and sign an agreement immediately, to pay the remainder within a certain time.

It was objected by the *Attorney-General*, for the defendant, that the plaintiff must be nonsuited, inasmuch as there was nothing whatever to bind him as a party to the contract, and by which the defendant could call upon him to sell.

Campbell, contrâ. The agreement is signed by the defendant, and that is sufficient within the statute of frauds; and the practice at auctions is for the vendor only to sign.

LORD TENTERDEN, C. J. The question is of very great importance. The declaration alleges the consideration to be the sale by the plaintiff; but nothing at all appears to bind him; his name is not mentioned in the conditions, nor in the agreement. What a court of equity would do in this case, I cannot possibly say; it was the duty of the auctioneer to sign, and I have often had occasion to lament they do not do so.

His Lordship then asked Campbell, whether, if he decided the point, he would carry the cause forward on a bill of exceptions; and on Campbell's declining to do so, said that the cause must proceed.

It was then proved for the defence, that there were only two other bidders at the auction; and that both these were authorized by Walters & Co. to bid up to the sum of 1600*l.* No communication was made to the public of there being any puffer, nor of there being any reserve. Both made several biddings. And it was urged by the *Attorney-General*, that this was such a fraud as to vitiate the sale.

Campbell contended, that the persons employed being authorized to bid up to a certain sum only, could not be considered as general puffers; and the legislature^(a) had expressly sanctioned such a bidding by one person, and that inasmuch as the limit was the same, there being two could make no difference.

LORD TENTERDEN, C. J. I am clearly of opinion that this sale is void in

point of law. I am not called on to decide the case of one person only being employed to bid; here are two, and it certainly makes a material difference, whether a person wishing to purchase sees one or two persons bidding against him. But that I may not be understood to decide this case on that ground, I will add that the strong inclination of my opinion is, that if only one person be employed to bid, with a view to save the auction duty, the sale is void, unless it be announced that there is a person bidding for the owner; the act itself is fraudulent. The statute alluded to was made for a different purpose, with a view to the duty only, and cannot be made to sanction what is in itself fraudulent. The plaintiff must be called. Nonsuit.

Campbell and Patteson for the plaintiff.

Scarlett, A. G., and Hutchinson, for the defendant.

See the former cases on this question, collected in *Sugd. Vend.* p. 21, and *Crowder v. Artin*, 3 Bing. 367.

ASHTON v. LONGES.—p. 127.

In an action on a bill of exchange, accepted for the accommodation of the drawer, who has become bankrupt and obtained his certificate, the latter is a competent witness for the acceptor.

ENDORSEE against acceptor of a bill of exchange.

The bill was accepted for the accommodation of Potter the drawer, who had become bankrupt and obtained his certificate, and had released his assignees.

Potter was called as a witness for the defendant, to prove that the bill had been usuriously discounted.

Gurney objected that he was incompetent, as being liable over to the defendant.

Lord TENTERDEN, C. J. The statute 6 G. 4, c. 16, § 52, enables the defendant to prove under the commission as soon as he has paid; the witness is, therefore, discharged. I think him competent. Verdict for the plaintiff.

Gurney and Thesiger for the plaintiff.

Scarlett, A. G., for the defendant.

TODD v. HOGGART.—p. 128.

In an action to recover the deposit on the purchase of an estate on the ground of a defect in the vendor's title, specified on rescinding the contract, no objection can be insisted on at the trial which was not stated as a reason for refusing to complete the contract, if it be of such a nature that it might, if then stated, have been removed.

THIS was an action against an auctioneer to recover the deposit paid by the plaintiff, on the purchase, by auction, of certain life and reversionary interest in stock in the public funds.

An abstract of title had been furnished to the plaintiff, who had taken counsel's opinion, in which a particular objection was specified, and no others were mentioned by the attorney for the plaintiff on his communicating this opinion as the ground for refusal to complete the purchase.

The defendant took other counsel's opinion that the title was good, and communicated this to the plaintiff's attorney, and proposed a meeting to examine and compare the deeds with the abstract; and on refusal, claimed the deposit as forfeited.

The abstract stated a deed as executed by the assignee of a bankrupt who had

been previously interested in the property; in fact, the deed was not executed, but it was proved that the assignee was ready to execute it.

It was agreed before the trial that the verdict should be taken, subject to a special case.

Gurney for the plaintiff, urged the deficiency of this deed as another objection, besides that specified in the opinion at the time the contract was rescinded; and proposed that this objection should be stated as part of the case.

Lord TENTERDEN, C. J. I am clearly of opinion that you cannot rely upon that objection, now; if it had been urged at the time, it might have been supplied. The case must be confined to the objection then specified.

Verdict for the plaintiff, subject to the case which is still pending.

Gurney and *Coltman* for the plaintiff.

Campbell and *Chitty* for the defendant.

TOOSEY, Administratrix of TOOSEY, v. WILLIAMS.—p. 129.

Where the practice of the defendant's counting-house was that the clerk, after copying a letter into the letter-book, returned it to the defendant to seal, and that he or another clerk carried all letters to the post-office, but there was no particular place of deposit in the office for such letters, and neither of the clerks had any recollection of the particular letter offered in evidence, though they swore that they uniformly carried all letters given them to carry: Held, that the entry in the clerk's writing in the letter-book of a letter to the plaintiff could not be read as proof of such letter having been sent to the plaintiff.

ASSUMPSIT for money had and received to the use of the intestate.

To prove that a letter called for under a notice to produce, had been sent to the intestate in India, from London, where the defendant resided and acted as the intestate's agent, a clerk in the defendant's office was called, and produced a letter-book, in which the letter was copied in his handwriting; and he stated the practice in the defendant's office to have been for him to copy into the letter-book all letters for India; that when copied, they were given to the defendant to seal, and afterwards carried either by the witness, or another clerk, to the letter-office at the India House; but that there was no particular place of deposit in the office for the letters that were to be carried. Both the clerks swore they always carried the letters given them for that purpose; but neither had any recollection of this particular letter.

The *Attorney-General* for the plaintiff objected to the reception of the letter; and he argued, that it would be open to the fraud of the defendant's manufacturing evidence for himself, and afterwards withholding the letter. There was nothing to show that the letters copied into the book by the clerk had been returned to him by the defendant, and carried to the East India post-office. In public offices a course of business like this might be sufficient; but so loose a practice ought not to be sanctioned in private counting-houses.

Campbell, contra. It is in every day's practice to receive evidence of this sort in the case of private counting-houses; both clerks swore to carrying the letters, and there is nothing whence to infer any fraud, or deviation from the practice.

Lord TENTERDEN, C. J. I have great reluctance to refuse this evidence; but am bound to do it. The practice here differs from that in most counting-houses; if the duty of the clerk had been to see the letters he copied, carried to the post-office, it might have done; but here there is something else to be done afterwards, and that by the defendant. There is not enough shown to render the letter admissible.

Verdict for the plaintiff.(a)

Scarlett, A. G., Reader, and Ashmoor, for the plaintiff.

Campbell and *Crowder* for the defendant.

(a) *Hagedorn v. Reid*, 3 Camp. 379. *Hetherington v. Kemp*, 4 Camp. 193.

COWIE and Another, Assignees of ROBINSON, v. HARRIS and Another.—
p. 141.

Where a petitioning creditor's debt arises on a note endorsed, or a bill accepted, by the bankrupt, evidence must be given that the endorsement or acceptance was prior to the act of bankruptcy: the mere production of the instrument, bearing an earlier date, is insufficient.

On a commission issuing on May the 14th, a dealing on March the 14th is valid, as "more than two calendar months" before the issuing of the commission.

A pawnbroker received a parcel of goods on one day, and on that and several subsequent days he advanced sums of money, each not exceeding 10*l.*, as on different parts of the parcel, and received pawnbroker's interest of three-pence in the pound per month on those sums: Held, that it was a question for the jury whether this really were one transaction, and a mere contrivance for obtaining the higher interest on the whole sum, in which case it is void, or whether the advances were really distinct.

GRIFFITHS v. FRANKLIN and FIESTALL, Executor and Executrix of FIESTALL.—p. 146.

In assumpsit against several defendants, as executors, with plea of no unques executors, the plaintiff may have a verdict against the real executor on the counts laying the promises by the testator, and the other defendants must be discharged.

THIS was an action of assumpsit. The first set of counts laid the promises as made by the testator, the second as made by the defendants, as executor and executrix. Pleas, first, by both defendants, the general issue; second, by both, no unques executor and executrix, and issue thereon.

It was attempted to charge the defendants as executors *de son tort*; but on the probate of the will being put in, it appeared that Franklin was executor, and Fiestall residuary legatee: whereupon a verdict was claimed for both defendants, or that the plaintiff should be nonsuited, on the general rule, that if one defendant be discharged in assumpsit, the other must be so also.

GASELEE, J. I think the plaintiff may, notwithstanding, have a verdict against Franklin, on those counts, which lay the promises by the testator. The contract in each of those counts is alleged to have been made with the testator, and it is proved as laid; the principle, therefore, does not apply, and there is no inconsistency on a plea which does not put the contract in issue, but only goes to the personal discharge of one of the parties, in finding against one, and for the other. There may be a verdict for the plaintiff against Franklin, on those counts which lay the promises by the testator; but the plaintiff must fail on the others.

Verdict for the defendants on the merits.(a)

Adams, Serjt., and *Miller*, for the plaintiff.

Wilde, Serjt., for the defendants.

(a) 1 Saun. 207, a.

SITTINGS AFTER HILARY TERM, IN K. B.

9 GEO. IV. 1828.

DOE dem. MACLEOD v. EAST LONDON WATERWORKS COMPANY.
—p. 149.

If a deed be produced, purporting to bind a trading company, proof that the person executing it was their general law agent is *prima facie* sufficient, without showing that he was authorized to execute the particular deed.

EJECTMENT.—The plaintiff tendered in evidence a contract entered into by deed, signed by Pickering, the chief clerk and solicitor of the company, purporting to be an agreement on their behalf for the purchase of the interest of the lessor of the plaintiff. The deed recited, that the company held under a person through whom the lessor of the plaintiff claimed title to the premises, and was tendered in evidence to prove that fact.

Sir *James Scarlett* objected to the reading of this agreement, without proof of the authority of Pickering to sign such a deed for the company. An attorney has no right, without express authority, to sign deeds for his principal.

Campbell. That rule only applies to the attorney in a suit, or for a special purpose; but here the agreement is signed by the general law agent for the defendants. It is, therefore, at least good *prima facie* evidence against them, especially as the object is not to enforce the deed, but merely to show the relation which the parties acknowledged with respect to each other.

Lord TENTERDEN, C. J. I do not think it makes much difference, whether the object be to enforce the particular deed, or in any other way to bind the company by its contents; I am of opinion, however, that it may be read. Considering the situation which Pickering held, it is reasonable evidence; if he exceeded his authority, the defendants may call him to prove that he did so.

Verdict for the plaintiff.

Campbell and *Chitty* for the plaintiff.

Sir *J. Scarlett* and *Brodrick* for the defendants.

The COMPANY of PROPRIETORS of the NORWICH and LOWESTOFT NAVIGATION v. THEOBALD.—p. 151.

The statute establishing a particular company, provided that "the whole of the said sum of 100,000*l.* shall be subscribed before any of the powers and provisions given by the Act shall be put in force." The company made a call on the shares before the subscriptions were complete, and commenced an action for the call after they were so: Held, that such action was not maintainable; the completion of the subscription list being necessary to enable the company to make the call, as well as to bring the action.

Evidence that an advertisement was inserted in a country newspaper circulated at the residence of a party, is not admissible as proof of notice to the party of the facts contained in the advertisement, unless it be shown that he took the newspaper in.

DEBT for a call on shares in the undertaking.

The statute 7 & 8 G. 4, c. 42 (the act establishing the company), provides by sect. 56 that in any action for calls, it shall only be necessary for the company to prove, that the defendant at the time of making such call was an owner of shares in the undertaking; that such call was in fact made, and that such notice thereof was given as is directed by the act; and that the company should thereupon be entitled to recover what should appear to be due.

The 50th section of the act provides, that "the whole of the said sum of 100,000*l.*" (the estimated expense of the works) "shall be subscribed before any of the powers and provisions given by the act shall be put in force," and the 51st section provides, that no greater sum than 100,000*l.* be raised.

The plaintiffs having proved their case in the manner directed by the act, the defendant's counsel showed, that the last signature had not been affixed to the deed until after the call for which the action was brought had been made, although it was affixed before the action was commenced; and they contended, that the call was consequently void under the 50th section of the act.

Sir *J. Scarlett*, for the plaintiffs, answered, that the 50th section did not require that the deed should have signatures to the whole amount, but merely that the whole amount should be subscribed. It is sufficient that the party should be bound to contribute the full amount of his subscription, and this he may have been before the call, although he did not affix his name to the deed till afterwards. This, therefore, the defendant must negative; for the act provides

that the plaintiff need only give certain evidence, and that evidence he has already given; the defendant, therefore, must completely establish his objection. Besides, according to the true construction of the act, the objection cannot succeed; for the words, "before any of the powers and provisions given by this act shall be put in force," are not to be understood of the making a call, but of the attempting to enforce it by action, and when the action was commenced, the deed was subscribed to the full amount.

Lord TENTERDEN, C. J. I think that is not the true construction of the act: by the clause in question, the company can do nothing till the whole 100,000*l.* is subscribed; they are not competent, therefore, to make a call. The only question, then, is as to the evidence. Now, it appears that a signature was affixed to the deed after the call was made: this is reasonable evidence that the subscription was then made; and if so, as the subscriptions cannot, by the express provisions of the act, exceed 100,000*l.*, they were incomplete at the time of the call. It may be that the subscription may have been made at an earlier period than the signature; and if it were so, that may, perhaps, furnish an answer to the objection. The plaintiffs may prove that fact, if it exists; but, in the absence of such evidence, the defendant has proved enough to sustain his objection. Nonsuit.

One of the grounds of defence originally relied on was, that a prospectus had been circulated, differing in its terms from the deed which the defendant afterwards subscribed, and that his subscription, therefore, was not binding, as having been obtained by an imposition. To meet this anticipated defence, the plaintiffs had proposed to give evidence, in the first instance, of proceedings inconsistent with the original prospectus, of which the defendant had had notice, and had not objected to them. The only notice proved, was one circulated in the *Norfolk Chronicle*, a newspaper which was proved to circulate in the city of Norwich, where the defendant lived; but no evidence was given that he was in the habit of taking it in.

The *Solicitor-General* objected to the receipt of the evidence; and Lord TENTERDEN refused it, saying, that some proof was always given that the party took in the newspaper in question.^(a)

Sir James Scarlett and Alderson for the plaintiffs.

Tindal, S. G., F. Pollock, and F. Kelly, for the defendant.

(a) *Leeson v. Holt*, 1 Starkie, N. P. C. 186. *Rowley v. Horne*, 3 Bingh. 2.

DREW and Another v. BIRD.—p. 156.

On a bill of lading of goods "shipped by A. B. to be delivered to C. D. or his assigns, he or they paying freight;" if the goods are delivered without receiving freight, the shipper is not liable for the freight, there being no charter-party.

In such a case, where the shipper afterwards promised, by writing, to pay freight, Held, that it was a question for the jury, whether on the account between A. B. and C. D., A. B. was, as between them, to pay the freight; and that, if he had consented to do so, he was liable on the subsequent promise.

ASSUMPSIT for freight.

There was no charter-party. The bills of lading stated the goods to be "shipped by A. Bird (the defendant), by the ship *Medora* for London, to be delivered to E. Griffiths for the Imperial Distillery Company, or to his assigns, he or they paying freight for the same."

The goods were conveyed to London, and delivered to Griffiths without receiving freight. Afterwards, and after several ineffectual applications to Griffiths and to the company for payment, the plaintiffs applied to the defendant by letter, and received an answer, that "if Griffiths did not pay, he the defendant would."

Campbell for the defendant. On this state of facts, Griffiths, and he only, is liable: he is the consignee; he has received the goods; and he, by the terms of the

bill of lading, is to pay the freight. In the cases of *Penrose v. Wilkes*, Abbott on Shipping, 281, 5th edition, and that class of cases, there was a charter-party as well as bills of lading; but here there is none; the whole contract arises on the bills of lading, and on them Bird is not liable. The plaintiffs might have secured themselves by their lien; but they gave it up. If this be so, Bird cannot be made liable by the letter which he afterwards wrote; it is at most only a promise to be answerable, in case of the default of Griffiths; and the declaration is not framed on such a promise, nor indeed is there any consideration shown for it.

Lord TENTERDEN, C. J., in summing up to the jury said,—Independently of the letter of the defendant, I think there is nothing to entitle the plaintiffs to a verdict. The bill of lading directs them to deliver to Griffiths, he paying freight: they deliver without receiving it: they cannot thereby make Bird liable to them, if he were not so originally; and on the face of the bills of lading nothing appears to charge him. Then the question arises, whether the subsequent letter alters the case. On that letter the proper question for your consideration will be, Can you infer from it that the state of the account between Griffiths and Bird was such, that, as between them, it was Bird's duty to take the payment of the freight upon himself, and that he had consented to do so? If these facts were so, they will furnish a good consideration for Bird's promise to pay it, and the plaintiff will be entitled to recover: if otherwise, the promise will not be binding, and the defendant must have a verdict.

Verdict for the plaintiffs.(a)

F. Pollock and D. Pollock for the plaintiffs.

Campbell and Jardine for the defendant.

(a) On the first point, see *Barker v. Havens*, 17 Johns. Rep. 234, cit. in p. 652 of the American edition of Abbott on Shipping, printed in 1822, with Judge Story's notes.

In that case a different rule appears to have been recognised. The shipper, who was also the owner of goods which by the bill of lading were to be delivered to the consignee, he paying for the same, was held liable for the freight; the goods having been delivered without receiving it, and the consignee refusing to pay it on demand: but it seems to have been considered that, if the goods had not belonged to the consignor, and were not shipped on his account, he would not have been so.

STEWART, Assignee of PAYNE, v. LEE and Others.—p. 158.

The defendants received money to the use of A. and B., assignees of a bankrupt. B. was afterwards removed, and A. became the sole assignee, the money still remaining in the hands of the defendants. He may well declare as for money had and received to his own use as assignee, without mentioning B. at all.

C. draws a check on his banker, payable to A. and B., assignees of C. or bearer, and writes the name of their banker across it. B., who has another private account with the banker, pays the check into that account: Held, that the bankers are justified in applying it to that account; the drawer's writing the name of the bankers of the payees of the check across it not being, according to the custom of trade, information to the bankers that the money is that of the payees.

Semble, the custom of writing the name of a banker across a check is only for the purpose of securing that the payment shall be made to some banker, not to the banker originally named, for the holder may substitute another for him; and this even when the name of the particular banker is originally written, not by himself, but by the drawer.

ASSUMPSIT for money had and received, to the use of the plaintiff, as assignee.

At the time of the transaction in question, Stewart the plaintiff, and one Crossthwaite, were joint assignees of Payne; but Crossthwaite subsequently became bankrupt, and before action brought, his assignees, under an order of the Lord Chancellor, assigned to Stewart, who thus became sole assignee of Payne.

Payne's property had been sold by Farebrother for the sum of 792l. 6s. 4d. Farebrother paid that sum to Hullock, the managing clerk of Crossthwaite. He inquired of Hullock, who were the bankers of the assignees, and was informed that the defendants were, on which he wrote their names across the check he gave, of which the following is a copy:—

Messrs. Coutts & Co.

Pay to Messrs.
of Payne, or bearer, seven hundred
and four pence.

£792 6s. 4d.

Messrs. Lees & Co.

21st January, 1826.

Crossthwaite and Stewart, assignees
and ninety-two pounds six shillings

T. FAREBROTHER.

Crossthwaite had an account with the defendants as surviving partner of one Wilkinson, as well as his joint account with Stewart as assignee of Payne. Crossthwaite's son brought the check in question to the defendants, and directed them to place it to the account of Wilkinson and Crossthwaite. They did so, received the amount of the check from Messrs. Coutts and Co., and paid bills of a greater amount on Crossthwaite's account, as surviving partner of Wilkinson, before his bankruptcy, at which time there was a balance due to them on that account. The action was brought to recover the 792l. 6s. 4d., the plaintiff contending that the defendants were bound to apply the check to the account of the assignees, and not to that of Wilkinson and Crossthwaite.

The *Solicitor-General* for the defendant took a preliminary objection, that the declaration did not properly describe the cause of action, if any were maintainable. At the time when the check was paid, Crossthwaite and Stewart were joint assignees, and the money was therefore had and received to their use, not to that of Stewart only, as stated in the declaration. Stewart certainly may maintain an action without joining Crossthwaite; but the manner in which the cause of action arose must nevertheless be correctly stated.

Sir *James Scarlett* answered, that that would be the case, if the right of the plaintiff depended on an express contract, which certainly must be described as made with the persons who were actually parties to it at the time; but it was different with the implied promise in this declaration, which arose merely from the fact, that the defendants had money in their hands which they ought to pay over, and would therefore be implied by the law to the person who at any time was entitled to receive it: and the plaintiff alone had this right previously to the commencement of the action: and—

Lord TENTERDEN, C. J., overruled the objection.

It had been originally stated on the part of the plaintiffs, that the custom of bankers in London, when the name of a particular banking-house is written across a check in the manner stated above, was, to pay that check to no one except the bankers whose name was so written: and it was contended that, as the bankers of Wilkinson and Crossthwaite, if they had been different from those of Crossthwaite and Stewart, could not, according to that custom, receive the check, they ought not, because they happened to be the same, to receive it and apply it to a different account from that on which they received it. It was, however, stated by some of the jury, that the custom only extended to making the bankers refuse to pay a check so written across to any one but a banker; but that it was usual for the holder to strike out the name of any banker already written across, and to substitute another, or that the words "and Co." only were often written in the first instance, and the particular banker's name filled up afterwards; the only object being to insure the presentment by a banker for the purpose of making it easier to trace the checks, not to secure the payment to a particular party, or to restrict the circulation.

Sir *James Scarlett* then argued on the part of the plaintiff, that although this custom might enable the holder for his convenience, to write first the name of one banker, and then that of another, across the check, it would not apply where the name of the banker was written by the party drawing the check. When the owner originally gave the direction that the payment should be made to a particular banker, he might well alter that direction; but when the drawer of the check makes the application, the holder ought not to be allowed to alter it: that privilege, if it is to exist, ought to be confined to the drawer who made the

original application. At all events, enough appears on the check to raise suspicion, and then the defendants were bound to inquire into Crossthwaite's right to apply it to the account of Wilkinson and himself.

Lord TENTERDEN, C. J., in summing up to the jury, said—Any person who knowingly assists another in applying money to a different purpose from that to which he was bound to apply it, cannot treat that as a proper application of the money. There is no doubt here, that the money, which ought to have been applied to the account of Payne's assignees, was really improperly applied to that of Crossthwaite and Wilkinson, nor that this was done by Crossthwaite's direction. The fact that Crossthwaite had so directed, will not authorize the defendants in so applying the money, if, from the form of the check and of the writing across it, the defendants ought to have understood that the money for which it was given ought to have been applied to the account of the assignees, and of them only, at all events. It appears that the object of Farebrother, in so writing the name of Lees and Co., was to insure the payment of the check to them as bankers for the assignees, and the assignees are named as such in the body of the check, although it is also made payable to the bearer. If, however, these precautions, although adopted by Farebrother for the purpose of insuring the payment to the right account, were not sufficient to give the defendants information to what account they were bound to apply it, the defendants cannot be affected by them. Whether they were so, is certainly a question of mercantile usage, and therefore especially fit for your consideration. If you think that, under the circumstances, the defendants ought to have known that the check was properly applicable only to the account of the assignees, your verdict must be for the plaintiff; if otherwise, for the defendants.

The jury, which was special, immediately found for the defendants.

Sir *James Scarlett* and *Evans* for the plaintiff.

Tindal, S. G., and *Patteson*, for the defendants.

REX v. BROWN and Others.—p. 163.

Where under a statutable offence time is material, the time stated in the indictment in arrest of judgment must be taken to be the true time, without a substantive averment.

Thus where a statute made it penal to exhibit lights to persons at sea, within a particular half of the year, an allegation that the party exhibited lights on a particular day in a particular month within that half year is sufficient.

THE prisoners were indicted under the 52d section of the 6th G. 4, c. 108.(a)

The indictment stated, that the defendants, between sunset on the 8th and sunrise on the 9th of March, that is to say, on the morning of the said 9th of March, about three o'clock, did make, aid, and assist in making certain lights, fire, &c., for the purpose, &c.

The prisoners were proved to have made lights, &c., on the morning of the 9th of March.

Before he addressed the jury, *Follett*, for the prisoners, objected that the indictment did not state the offence to have been committed between the 21st

(a) And be it further enacted, That no person shall after sunset, and before sunrise, between the twenty-first day of September and the first day of April, or after the hour of eight in the evening, and before the hour of six in the morning, at any other time in the year, make, aid, or assist in making, or be present for the purpose of aiding or assisting in the making of any light, fire, flash, or blaze, or any signal by smoke, or by any rocket, fire-works, flags, firing of any gun or fire-arms, or any other contrivance or device, or any other signal, in or on board, or from any vessel or boat, or on or from any part of the coast or shore of the United Kingdom, or within six miles of any part of such coasts or shores, for the purpose of making or giving any signal to any person on board any smuggling vessel or boat, whether any person so on board of such vessel or boat be or be not within distance to see or hear any such light, fire, flash, blaze, or signal; and if any person, contrary to the true intent and meaning of this act, make or cause to be made, or aid or assist in making any such light, fire, flash, blaze, or signal, such person so offending shall be guilty of a misdemeanor.

September and the first of April;—that the allegation in the indictment that it was committed on the 8th of March, was not sufficient, because the prosecutor was not bound to the day laid, but might prove the offence to have taken place on any other day or in any other month;—that the time here was the essence of the offence, and, therefore, it ought to have formed a distinct and substantive averment in the words of the statute.

LITTLEDALE, J., said he would consult his learned Brother Gaselee; but as the objection, if any, was on the record, he thought the proper stage to take advantage of it would be by motion in arrest of judgment, or by writ of error.

On the objection being renewed next morning, in arrest of judgment,

LITTLEDALE, J. The day having been proved as laid, I thought the objection could only properly be made in this form, and I now think it is no valid objection. Even in this stage I am bound to take judicial notice that the day averred in the indictment is, in fact, within the period mentioned in the statute. What burden of proof that throws upon the prosecutor, it is not necessary to inquire; upon the face of the indictment, the offence is charged upon a day between September and April. The indictment, therefore, is good, and I think there is no ground for arresting the judgment.

Wilde, Serjt., *C. F. Williams*, *Selwyn*, *Erskine*, and *Moody*, for the crown
Follett for the prisoner.

(a) *R. v. Napper*, R. & M. C. C. R. 44.

REX v. GILHAM.—p. 165.

Exhibiting in an assize town inflammatory publications respecting a crime about to be tried at the assizes is not a contempt which the judge of assize can interfere to stop by committing the party exhibiting.

THE prisoner was in the calendar for trial at these assizes for the murder of Maria Bagnall at Bath. The murder had excited great interest there, and inflamed accounts had been published in the newspapers representing the prisoner as the murderer. During the assizes an artist was exhibiting in the town-hall of Taunton models of Maria Bagnall as she was found dead, and of Richard Gilham, the supposed murderer, and a bust of the ruffian Williams, the supposed murderer of the Marrs and Williamsons.

Bompas, Serjt., for the prisoner, moved that the man might be apprehended, and committed for a contempt, inasmuch as the exhibition was calculated to prejudice the minds of the jurors, and likely to deprive the prisoner of a fair and temperate trial. He cited the case of *Rex v. Clement*, (a) as a precedent for the interference sought.

LITTLEDALE, J., after consulting with Gaselee, J., said, I think the exhibition highly indecorous and improper, and one that may subject the man to punishment; but it does not appear to me or to my learned Brother to be a contempt, therefore I cannot interfere in the mode proposed to commit the person exhibiting.

(a) Reported 4 Barn. & Ald. 218, and 11 Price, 69, and subsequently confirmed by the Chancellor of the Duchy of Lancaster, assisted by Bayley and Holroyd, Justices.

DOE dem. WARREN v. BRAY and Others.—p. 166.

In ejectment, where each party claimed as heir at law, and the real question was as to the legitimacy of the defendant, who was clearly heir if legitimate; he proposed to admit that, unless he were legitimate, the lessor of the plaintiff was the heir at law: Held, that this admission did not give him the right of beginning.

EJECTMENT. The lessor of the plaintiff claimed as heir at law of Hannah Bray, the person last seised. A. Bray, one of the defendants, was the son of T. Bray, a brother of Hannah Bray; and he was undoubtedly the heir at law of H. B., if he were legitimate.

Campbell and *R. V. Richards* for the defendants, proposed to admit that, if the defendant, A. Bray, were not legitimate, the lessor of the plaintiff was heir at law of the person last seised; and he claimed the right of beginning after that admission on the ground that the legitimacy of A. Bray was then the only question in the cause, and the affirmative of that question lay on the defendant. Thus in *Goodtitle d. Revett v. Braham*, 4 T. R. 497, where the defendant claimed under a will, the validity of which was disputed, he was allowed, as he had to establish the validity of the will, to have the general reply; and in *Doe d. Corbett v. Corbett*, 3 Campb. 368, where the question was as to the validity of a codicil under which the defendant claimed, the plaintiff's right under the will being admitted, the defendant was allowed to begin. In those cases, the only question was as to the validity or spuriousness of a particular instrument; in this, as to the legitimacy or spuriousness of a particular offspring: and the same rule ought to be adopted in each; that if the defendant has to maintain the validity of the only step in dispute in the cause, he is entitled to begin, and support it. The affirmative of the issue here is on us, that A. Bray was legitimate; and we have a right to prove that fact in the first instance. In this case, as well as in those cited, we admit everything, except the one fact disputed between the parties.

Russell, Serjt., and *Maule*, for the plaintiff, answered, that in the cases cited, the admission on the part of the defendant was that the plaintiff had a complete right of action, subject only to be defeated by the establishment of a subsequent fact consistent with all the facts relied upon on his part, by defeating the legal consequences of those facts. Here, a fact is excepted from the admission, without which we have no title; for we claim as heir at law, and we have not that claim without the assumption that the person in question is illegitimate. The defendants have, therefore, no right to except that fact out of their admission, and split our case in this manner to entitle themselves to the privilege of beginning.

VAUGHAN, B. I think the plaintiff is in this case entitled to begin. Generally, the party on whom the affirmative lies has that right: the fallacy is in the application of that rule to the particular case. The question here is, whether the lessor of the plaintiff is heir at law of Hannah Bray; and the affirmative of that issue is on the plaintiff: it may turn out that this question turns entirely on the legitimacy of A. Bray, but still the issue is not on that fact, but on the heirship of the lessor of the plaintiff. In the cases cited, the admission was of the heirship, or of the validity of a prior will; and then the cause turned entirely on a subsequent question, the validity of a will, or a codicil, of which the defendant was to prove the affirmative: here the admission does not go so far, and I think it does not give the defendant the right of beginning. Verdict for the defendants.

Russell, Serjt., and *Maule*, for the plaintiff.

Campbell and *R. V. Richards* for the defendants.

(a) See also Fenn dem. *Wright v. Johnson*, Adams on Ejectments, 2d edit. 256, n., where the admission was of the heirship of the lessor of the plaintiff; and *Le Blanc, J.*, and *Wood, B.*, on different occasions held the defendant entitled to begin. On another occasion between the same parties, *Gibbs, J.*, held that even this admission was insufficient to give him that right.

SITTINGS AFTER EASTER TERM, IN K. B.

9 GEO. IV.—1828.

VANDERPLANK and Another v. MILLER and Another.—p. 169.

In an action for running down a vessel, the plaintiff cannot recover unless the injury is attributable entirely to the fault of the defendants: if he were partly in fault, but the defendants with care might have prevented the accident, he cannot maintain his action.

CASE. The action was brought against the owners of a ship called the Robert and Ann, for negligence in the navigation of it, whereby it ran foul of a small vessel called the Louisa, on board of which there were goods of the plaintiffs, and sunk the vessel, and thereby destroyed the goods.

The evidence showed, that the Louisa was at anchor, waiting for the tide to carry her up the river Thames, and that the Robert and Ann coming rather suddenly on her in rounding a corner of the river ran foul of her, and sunk her. There was evidence to show that the Robert and Ann, if carefully and skilfully navigated, might have avoided the Louisa; but there was also evidence, that the whole of the crew of the Louisa were below at the time of the accident; and that if any of them had been on deck, they might, by a slight shifting of the position of the Louisa as she lay at anchor, have avoided the shock of the Robert and Ann, and the accident would not have happened. The plaintiffs, therefore, contended, that the accident happened by the fault of the crew of the Robert and Ann; the defendants, that it was by the negligence of the persons on board the Louisa.

Lord TENTERDEN, C. J., in summing up to the jury, said, The question is, Whether you think that the accident was occasioned by the want of care on the part of the crew of the Robert and Ann? If there was want of care on both sides, the plaintiffs cannot maintain their action: to enable them to do so, the action must be attributable entirely to the fault of the crew of the defendants.

Verdict for the plaintiffs.

Campbell and R. V. Richards for the plaintiffs.

Sir James Scarlett and Platt for the defendants.

LITTLE v. SLACKFORD.—p. 171.

A paper in these words, "Mr. L., please to let the bearer have 7*l*., and place it to my account, and you will oblige your humble servant, R. S.," is not a bill of exchange.

DEBT for money paid.

The defendant being indebted to J. S. for work done, gave him an unstamped paper addressed to the plaintiff in the following words:—

"Mr. Little, please to let the bearer have seven pounds, and place it to my account, and you will oblige

Your humble servant, R. SLACKFORD."

There was also some slight evidence that the defendant had acknowledged the debt.

Comyn, for the defendant, objected, that the paper produced was a bill of exchange, and could not be read for want of a stamp, and the other evidence would not warrant a verdict.

Lord TENTERDEN, C. J. I think no stamp is necessary; the paper does not purport to be a demand made by a party having a right to call on the other to

pay. The fair meaning is, "You will oblige me by doing it." Even without the paper, the other evidence would probably entitle the plaintiff to a verdict.

Verdict for the plaintiff.

Archbold for the plaintiff.

Comys for the defendant.

AVENELL v. CROKER and Another.—p. 172.

Where a party distrains for more rent than is due, but takes only a single chattel, he is not liable to an action for distraining for more rent than is due, though the thing taken be of greater value than is necessary to cover the rent actually due, unless there were others of less but sufficient value to be found.

The appraiser of a distress must be sworn before the constable of the parish where it is taken: the constable of the adjoining parish cannot interfere, though the proper constable is not to be found when wanted.

CASE. The first count of the declaration was for distraining for more rent than was due; the fourth for selling without having the distress appraised; the fifth in trover. The other counts did not become material.

It appeared that the plaintiff was tenant to one of the defendants of a house and stables, at the rent of 16*l.* a year, payable at Lady-Day and Michaelmas. Soon after Lady-Day a distress was made for the rent then due, and part of the arrear was discharged thereby; but a sum of 5*l.* 10*s.* was left still due. After Midsummer, and before Michaelmas, the landlord put in another distress for 9*l.* 10*s.*, that sum being the former arrear 5*l.* 10*s.* and 4*l.* claimed as for a quarter ending at Midsummer. The house and stable were both locked up, but the bailiff broke open the door of the stable, and took a horse worth 8*l.* or 10*l.*, being the only thing distrainable which he found there. The horse was appraised; but the appraiser was sworn, not before the constable of the parish, who could not be immediately found, but before the constable of the adjoining parish.

Gurney. The plaintiff is entitled to a verdict on the first, and fourth, and fifth counts. No rent became due at Midsummer, and the distress ought therefore to have been taken for 5*l.* 10*s.* only. The first count, therefore, is proved, and the damages recoverable on it will be the difference between the value of the horse and the sum then due. The fourth count is also proved: for the statute 2 W. & M. sess. 1, c. 5, s. 2, requires that the appraiser shall be sworn before the constable of the parish. Here he was not so sworn: there is then no legal appraisement. On both these grounds, and also on account of the breaking open the stable door, the distress is illegal, and trover may be maintained.

Lord TENTERDEN, C. J. The count in trover cannot be maintained; for the landlord had a right to distrain, and the tenant has no cause of complaint, unless for some irregularities in the distress. On the first count, also, I think he has no cause of complaint. If the party distraining has the opportunity of taking goods of smaller value than he really takes, and which would be sufficient to cover the rent, he is wrong. But here the house, where there probably would have been distrainable articles of smaller value, was locked up, and nothing could be got there without a more serious trespass than that actually committed; and in the stable there was nothing but the horse. If, therefore, the distress had been made for the sum really due, the horse might properly have been taken, even if its value was so great that the landlord ought, if he had the opportunity, to have chosen articles of less value. Had there been that opportunity, the case might have been different; but the defendants have gained, and the plaintiff lost nothing here, in consequence of the error in the sum stated in the distress; and the essence of the charge is that the mis-statement was wilfully and maliciously made. The verdict on this count, then, should be for the defendants. If the plaintiff has sustained injury by the detention of any overplus, he has not framed his action so as to recover it. But I think the plaintiff

is entitled to a verdict on the fourth count. It can only be for nominal damages, for no real injury has accrued from the irregularity; but I think that the constable of the parish where the distress is taken, is the proper officer to swear the appraiser, and that the circumstance, that he was not to be found at the time when he was wanted, does not authorize the interference of any other. The appraisement, therefore, was irregular, and the action, being properly framed in case for the irregularity, may be supported.^(a)

The jury, however, found for the defendants.

Gurney and Chitty for the plaintiff.

Sir James Scarlett and Alexander for the defendants.

In the following term *Gurney* moved for a new trial, on the ground that the verdict was against the Judge's direction in point of law. The Court determined to grant a rule nisi, unless the plaintiff would consent to a stet processus. The plaintiff acceded to these terms; and the matter, of course, was moved no farther.

(a) See *Wallace v. King*, 1 H. B. 13; *Broome v. Rice*, Str. 873.

BROMLEY v. HOLDEN and Another.—p. 175.

A landlord may maintain an action on the statute 11 G. 2, c. 19, § 3, for double the value of goods fraudulently removed to prevent a distress, although they be worth less than 50*l.*; he is not confined to his remedy by application to two magistrates.

MITCHELL, Executor, &c., v. JOHNSON.—p. 176.

Where the attesting witness to a bond cannot be produced, proof of his signature is sufficient evidence of the execution by the defendant, the obligor, though the defendant only signs by mark.

DEBT on bond.

The bond was attested by the plaintiff, and the defendant signed it only by his mark. The plaintiff's handwriting was then proved, and after objection, some slight evidence was given that the defendant had once lived at the place where the party executing the bond was described to live.

Parke for the defendant. This evidence is insufficient to fix the defendant. The parol testimony is quite trivial; and the mere proof of the signature of the subscribing witness is insufficient without some evidence that the party signing the instrument is the defendant in the cause. This is the general result of the cases collected in *Phillipps on Evidence*, vol. i. p. 473, 5th edition; and it is particularly necessary in such a case as the present, where the bond is executed by mark only, and the defendant cannot give evidence that the signature is not his handwriting.

Lord TENTERDEN. There is some evidence here beyond the mere proof of the attesting witness's signature. But if there were no other I should have no doubt of its sufficiency. If the objection were to prevail, it would often be impossible for the obligee of a bond to recover, where the subscribing witness was dead, and the obligor a marksman.

Verdict for the plaintiff.

F. Pollock and Manning for the plaintiff.

Parke for the defendant.

BIRT v. ROBERTS.—p. 177.

The bail to the sheriff cannot put in bail to the action before the return of the process, without the consent of the defendant.

TRESPASS for an assault and false imprisonment. Plea, not guilty.

The defendant was bail to the sheriff of Devon for the plaintiff in an action brought against him for 92*l.* by one A. B. The writ against the plaintiff was returnable on the first return of Michaelmas term. Before that time the plaintiff went to London, under circumstances likely to excite suspicion on the part of the defendant, who thereupon put in bail to the action; and they rendered the plaintiff, on the 15th of October, before the return of the writ against him. On the 1st of November he was discharged from custody, on the ground that the render was illegal, by an order of Holroyd, J., made after much consideration, and consultation with Littledale, J. The action was brought to recover damages for the imprisonment from the 15th of October to the 1st of November.

Campbell for the defendant. The proceedings in this case were regular; for it appears by *Hyde v. Whiskard*, 8 T. R. 456, that bail above may regularly be put in before the return of the writ; and the bail above may undoubtedly render their principal. The same rule is also recognised in *Tidd's Practice*, 6th edition, 252. The plaintiff, therefore, has no cause of complaint.

Lord TENTERDEN, C. J. Even if the facts relied on had been specially pleaded, I am of opinion that they would not have amounted to a justification in point of law. I think the cases cited have never been acted on to the extent of enabling the bail below to put in bail above before the return of the process, without the consent of the defendant. Doubt, however, might reasonably be entertained on the question; and I think that the circumstances are fit for the consideration of the jury in estimating the damages sustained: there must, necessarily, be a verdict for the plaintiff, for the facts, even if they were to furnish a justification, are not pleaded as such.

• Verdict for the plaintiff, damages one farthing; and the learned Judge certified to deprive him of costs.(a)

Adolphus and *Nicholls* for the plaintiff.

Campbell and *Follett* for the defendant.

(a) The same point was ruled by Lord Tenterden in *Rex v. Hughes and Others*, tried at Westminster at the Sittings after Trinity term, 1828. In that case, which was an indictment for a riot, the defendants, two of whom were bail to the action for the prosecutor put in by the bail to the sheriff before the return of the writ, had forcibly entered his house, and taken him, in order to render him; and his Lordship ruled, that as they were not justified in doing that, they must be convicted.

JONES v. KENRICK.—p. 179.

The judge at Nisi Prius cannot certify under the statute 5 G. 4, c. 106, § 21 (*Welsh Judicature Act*), unless the plaintiff prove that the defendant was in Wales at the time of the service of process.

SPENCER v. JACOB and Another.—p. 180.

The plaintiff was arrested by the endorsee of a bill of exchange, purporting to be drawn on him, and accepted by him. In fact, the acceptance was not his. This is not sufficient to support an action for a malicious arrest, the defendants having acted under a mistake, without malice.

CASE for a malicious arrest.

The plaintiff was held to bail as the acceptor of a bill of exchange drawn by J. S., and endorsed to the defendants. The bill, in fact, was addressed to Mr. J. Spencer, No. 3, Sidmouth street, and was accepted in the name of J. Spencer. The plaintiff's name was J. Spencer, and his residence was at No. 3, Sidmouth street; but the acceptance was not his. The bill was presented to him on its maturity by a banker's clerk, and he then denied that it was his acceptance; but there was no proof that this fact was communicated to the defendants.

Campbell, for the defendants, submitted, that the plaintiff must be nonsuited, for that there was no evidence of malice, or want of probable cause for the arrest.

Adolphus for the plaintiff. It is clear upon the whole evidence that the defendants took the bill on the credit of the endorser, without any inquiry as to the acceptor. They then fix upon a wrong person, who from the first disclaims it; and they arrest him without further inquiry. If they will do so, they must take the consequences of their conduct.

Lord TENTERDEN, C. J. The defendants may have been careless; they certainly are mistaken: but I can see no appearance of malice in their conduct; nor can I say that they were without probable cause for what they did. It does not even appear that they were informed that the plaintiff disclaimed the bill.

Nonsuit.

Adolphus and *Dundas* for the plaintiff.

Campbell and *Patteson* for the defendants.

BERNASCONI and Others, Assignees of CHAMBERS, v. ANDERSON and Ux., Administratrix of ANDERSON.—p. 183.

An acknowledgment of a debt, without specifying any amount, is not sufficient to entitle the creditor to nominal damages on a count upon an account stated.

ASSUMPSIT. The declaration contained a special count, which was not proved; the usual money counts, and a count on an account stated.

The bankrupt had been the intestate's banker; and the general account, independently of the sum in question in this action, was in favour of the intestate at the time of his death. It did not, however, appear to what extent it was so, or how far it had varied since the time when the letters, which will be mentioned, were written. Evidence of some of the circumstances connected with the transaction was given, but not enough to support any of the counts in the declaration; and then letters from the intestate to the bankrupt were proved, in which he spoke of the debt due from himself to the bankrupt, and promised to pay it; but no amount of debt was specified, or any mention made of the manner in which it accrued.

On this evidence, *F. Pollock*, for the plaintiffs, contended, that he was entitled to a verdict for nominal damages. The letters mention no sum, therefore the damages can only be nominal: but they acknowledge a debt, and that entitles the plaintiffs to a verdict either on the money counts, or on the account stated.

Lord TENTERDEN, C. J. The plaintiff cannot have a verdict, as on an account stated: for the letters ascertain no amount, and that is essential to the notion of an account stated. They certainly are evidence of a debt at the time they were written: but it is in evidence, also, that at the time of the intestate's death he had, independently of the claim now in dispute, a balance in his favour. Whether that fell short of the amount of this claim, we are not informed; and it is essential to the right of the plaintiffs to recover in this action that it should have done so. The plaintiffs, then, have not proved that any balance was due to the bankrupt at the time of the death of the intestate, and, consequently, they are not entitled even to nominal damages.

Nonsuit.

F. Pollock and Bolland for the plaintiff.

Sir James Scarlett and Hutchinson for the defendants.

See *Tacker v. Barrow*, 7 B. & C. 623.

ROLFE v. The Inhabitants of the HUNDRED of ELTHORNE.—p. 185.

Where the owner of property destroyed by malicious fire gives in his examination on oath under the statute 9 G. 1, c. 22, it is not necessary, in order to enable the owner to recover against the hundred, that any other person should do so.

The provision that the servants having the care of the premises shall do so, only applies to cases where the owner is away, and has no personal superintendence of the premises; not to cases where he merely happens to be absent at the instant when the fire happens.

THOMPSON v. SHACKELL.—p. 187.

It is not libellous fairly and honestly to criticise a painting publicly exhibited, however strong the terms of censure used may be.

CASE for a libel. Plea, general issue.

The libel complained of was a criticism published in the *John Bull* newspaper, of which the defendant was the publisher, on a portrait of the King, painted by the plaintiff, which was exhibited at Somerset-house. The libel termed the painting a mere daub, and used other strong terms of censure. It also imputed to the plaintiff that he had procured the King to sit for the portrait, under pretence of introducing it into a large painting of the King's embarkation in Ireland; and had then exhibited it as a single portrait, on canvass enlarged for the purpose: and this latter imputation was proved to be true.

It was contended, for the defendant, that the article complained of was a fair criticism on a work of art exhibited to public inspection; and, therefore, not libellous, on the authority of *Carr v. Hood*, 1 Campb. 355, n.

BEST, C. J., in summing up to the jury, said, The question for you is, whether the publication is a fair and temperate criticism on the painting of the plaintiff; or whether it be made the vehicle of personal malignity towards the plaintiff. I have myself (a) acted on the doctrine of my Lord Ellenborough in the case referred to, though I do not go quite as far as he did in that case, because I think no personal ridicule of the author is justifiable; but if this be really an honest criticism, and no more, this defendant is entitled to your verdict. If he has exceeded the limit of fair and honest criticism, then you will find for the plaintiff.

Verdict for the defendant.

Taddy, Serjt., and Reader, for the plaintiff.

Wilde, Serjt., and J. Parke, for the defendant.

(a) *Dunno v. Anderson*, R. & M. N. P. C. 287. See also *Soane v. Knight*, sup. 255.

SITTINGS AFTER TRINITY TERM, IN K. B.

9 GEO. IV.—1828.

DOE dem. DAVIS and Another v. ELSAM.—p. 189.

Provisoes for re-entry in a lease are to be construed like other contracts; not with the strictness of conditions at common law.

EJECTMENT. The action was brought on a clause of re-entry in a lease, in case Elsam, his executors, &c., should carry on the business of a pork butcher, on the premises, "or if any auction should be had on the premises, or use them for the sale of pork."

It was clearly proved that carcasses of pork had been exposed on the premises by one Summers, and that bargains had been made there by him with respect to the sale, and that there was a placard on the shop stating that orders for Summers, who was a pork butcher in the neighbourhood, were received here. It appeared, however, that the carcasses were always taken to Summers's own premises to be cut up, and that the bills for the meat supplied were made out as from Summers's own establishment. It further appeared that Summers had got into possession for another purpose, and that the defendant, as soon as he was aware of his conduct, immediately put a stop to it.

Brougham for the defendant, submitted that there was no forfeiture. All conditions to defeat an estate must be construed strictly. Now here the business carried on was not that of a pork butcher, which consists in the cutting up, and not merely in exposing the whole carcass. The first part of the proviso, therefore, was out of the question. And no recovery can be had on the second part; first, because it is ungrammatical and insensible; and, secondly, because there, also, the dealing was not within the words of the proviso; for the sale, even if the proviso had effect, was not completed on the premises, but at Summers's other establishment, where the meat was cut, and whence it was delivered.

Lord TENTERDEN, C. J. I think, under the peculiar circumstances of the case, the defendant having done all in his power to prevent the evil complained of, the plaintiff would do well to consent to withdraw a juror. In point of law, however, I think that the second part of the proviso must be considered to have the same effect as if it had been expressed "in case the premises should be used for the sale of pork;" and I also think that the artifice resorted to by Summers is only a fraud attempted on the proviso, and would not prevent its operation. I do not think provisos of this sort are to be construed with the strictness of conditions at common law. These are matters of contract between the parties, and should, in my opinion, be construed as other contracts. The parties agree to a tenancy on certain terms, and there is no hardship in binding them to those terms. In my view of cases of this sort the provisos ought to be construed according to fair and obvious construction, without favour to either side.

A juror was then withdrawn

Sir James Scarlett and F. Kelly for the plaintiff.

Brougham and *Chitty* for the defendant.

The COLLEGE of PHYSICIANS v. HARRISON.—p. 191.

The statute of 14 & 15 H. 8, c. 5, appointing and regulating the college of physicians, is a public act.

ROBERTS v. ALLATT.—p. 192.

A witness is not excused from answering a question on the ground that the conduct inquired into on his part would subject him to a penalty, if the time limited for proceeding for such penalty is past.

ASSUMPSIT by the endorsee, against the acceptor of a bill of exchange.

The defence was, that the bill was drawn and accepted for the balance of an account of stock-jobbing transactions.

To prove this one of the parties in the transaction was called as a witness. He objected to answer the question, on the ground that his answer might subject him to penalties under the stock-jobbing acts. It appeared, however, that the transaction had taken place more than three years before the trial; (a) and the witness stated, in answer to a question from Lord TENTERDEN, that he was not aware that any proceedings had been already commenced against him for the penalties.

Under these circumstances, it being too late now to commence proceedings for them, Lord TENTERDEN, C. J., held the witness bound to answer the questions put to him. (b)

Verdict for the plaintiff.

F. Pollock and *Platt* for the plaintiff.

Gurney for the defendant.

(a) 31 Eliz. c. 5, s. 5.

(b) In *R. v. Reading*, 7 Howell's St. Tr. 296, it was held that a witness was protected from answering questions respecting the commission of an offence, although he had received a pardon. This case (which is cited in Starkie on Evidence, part 2, p. 137, together with the case of Earl of R. v. Shaftesbury, 8 Howell's St. Tr. 817, as authority in favour of the doctrine there laid down) is not absolutely inconsistent with the principal case, because the pardon could only be made available by plea, and would impose proof on the defendant: in the principal case no action could be maintained for the penalties, unless the plaintiff showed them to have been incurred within the limited time. The reasons, however, which the judges in those cases gave for their decision were not of this character; and it may, probably, be doubtful whether, considering the nature of the trials, and the periods (1679 and 1681) in which they took place, the decisions can be considered as binding. In *R. v. Reading*, North, C. J., refused to allow the question, whether he had been guilty of certain offences, to be put to a witness for the crown, on the ground that "if he hath his pardon it doth take away as well all calumny as liableness to punishment, and sets him right against all objection. So you know, after an act of general pardon, it is a scandal to reproach a man for that which he is thereby pardoned for. So that if he have not his pardon his life is in danger: if he hath, neither his name nor life must suffer; and therefore, such questions must not be asked him;" and Dolben, J., and Wild, J., though less fully, adopted the same reasoning. The circumstances of *R. v. Earl of Shaftesbury* were still more remarkable. The court insisted, in compliance with the demand of the counsel for the crown, and in opposition to the wish of the grand jury, that the evidence of the witnesses should be heard by the grand jury in open court; and it was on a question put by one of the jury to a witness, expressly with a view of trying his character, whether he had not received a pardon, that North, C. J., refused to allow the question to be put.

SHERWOOD v. ROBBINS.—p. 194.

A condition in articles of sale, "that any error in the particulars shall not vitiate the sale, but a compensation shall be made," only applies to cases where the circumstances afford a principle by which this compensation can be estimated.

Therefore, on the sale of a reversion expectant on the death of A. B. without children, an error in the statement of A. B.'s age does not come within the condition (as it would if the reversion were simply expectant on A. B.'s death), because it affects the probability of the other contingency, which is not a subject of calculation; and the purchaser is entitled to rescind the contract.

ASSUMPSIT for money had and received.

The action was brought to recover from the defendant, an auctioneer, the deposit paid on a purchase at an auction of property described as "the reversion of 2000*l.* after the death of a person aged sixty-six." The property was stated to be subject to a contingency; and the nature of this was also stated in writing, made at the time of the sale, on the back of the particulars, to be such, that,

if the party on whose life the reversion was dependent should leave children, the reversion would be defeated; and the age of the party was then also stated to be sixty-six. The sixth condition of sale was in these words: "That if any mistake or omission shall be discovered in the description of the property to be sold, or any error whatever shall appear in this particular, such mistake, omission, or error, shall not vitiate the sale, but a compensation or equivalent shall be given or taken, as the case may require."

Some objections were made in point of law to the vendor's title, on which no opinion was expressed; but it was agreed that a special case should be made if they became material. Besides these objections it was proved that the party on whose death the reversion was expectant was only of the age of sixty-four, not of sixty-six, and the counsel on both sides addressed the jury on the question, whether this misrepresentation was wilful or not. Lord TENTERDEN left this question to the jury, and they found that the misrepresentation was wilful on the part of the vendor; and thereupon the verdict was entered for the plaintiff.

Lord TENTERDEN, C. J., then said: I left that question to the jury, because both parties seemed to wish it: but I am decidedly of opinion that the question was immaterial. In the case of a reversion, simply expectant on the death of an individual, if a mistake be made in his age, a compensation may be made under the condition, for the difference of value may be computed: but where there is an additional contingency, such as that of the birth of future children in this case, the difference of age alters the likelihood of that contingency; and in such a case, therefore, no estimate can possibly be made of the difference of value between the thing described and the thing sold, and the contract itself must be vacated.

Verdict for the plaintiff.

Sir James Scarlett, Campbell, and Comyn, for the plaintiff.

C. F. Williams and Ryland for the defendant.

JONES and Others, Assignees of WILD, v. FORT.—p. 196.

In an action by assignees of a bankrupt, where there are some counts or causes of action on which the bankrupt might have sued, and others on which he could not, the proceedings under the commission are admissible in evidence, if the plaintiffs elect to proceed only on those counts which the bankrupt might have sustained.

Where a party tendered evidence *prima facie* admissible: Held, that the other party ought not to be allowed to interpose with the evidence for the purpose of excluding it: but that it should be received, and expunged if afterwards shown not to be properly receivable.

TROVER for certain bills of exchange.

There were counts stating a possession by the bankrupt, and a conversion in his time; and others stating a possession by the plaintiffs as assignees, and a conversion in their time. There was also a special count, on which nothing finally turned, stating a cause of action for which the bankrupt might have sued.

Notice had been given to dispute the trading, &c.

Sir James Scarlett proposed to prove these facts by the proceedings under the commission.

F. Pollock. By the 6 G. 4, c. 16, s. 92, the proceedings are evidence only in cases where the bankrupt might have maintained the action. Here he could not, for there are counts on the possession of the assignees.

Lord TENTERDEN, C. J. The proceedings are evidence in actions which the bankrupt might have brought; and some of the counts are of that nature. On those counts, therefore, they are evidence; but if the plaintiffs rely on them as proof, they must abandon the counts on the possession of the assignees.

The facts in question were then proved by parol evidence.

The plaintiffs tendered in evidence the defendant's examination taken before the commissioners, and proved his handwriting to it. They called no person

present when it was taken, from whom *Pollock* might have elicited the facts on which he relied: but he stated, that questions had been put to the defendant, which would have enabled him materially to alter the effect of his examination as actually taken; that those questions, at the desire of the commissioners, were postponed to a later period of his examination, which was to be continued on the next day; that in the interval he was seized with apoplexy, and had never been able to complete his examination; and he claimed to be allowed, before the examination was read, to prove these facts; and contended that they would render it inadmissible, as incomplete, and requiring a qualification which it never received.

Sir *James Scarlett* objected to the receipt of the proof in this stage of the cause. It must be given as part of the defendant's case; and then the examination, if it be rendered objectionable as evidence, may be struck out of the notes of the evidence.

Lord TENTERDEN, C. J. I give no opinion on the effect of the evidence suggested; but I cannot admit it at present. The inconvenience of allowing the interposition of evidence out of its regular course would be very great. (a)

Some evidence of the kind mentioned, but not very strong, was afterwards given, and the examination was very little used or relied on, the case chiefly turning on another question of fact; but no opinion was intimated as to the effect of the evidence upon the strict admissibility of the deposition.

Verdict for the plaintiff, with leave to move for a nonsuit on another point.

Sir *James Scarlett*, *Platt*, and *Joshua Evans*, for the plaintiffs.

F. Pollock and *Parke* for the defendant.

A motion was afterwards made on the point reserved, but no notice was taken of those stated above.

(a) In the case of *R. v. Wakefield and Others*, tried before Hulleck, B., at Lancaster Lent assizes, 1827, which was an indictment for abduction, the principal witness was said to have been married in Scotland to the defendant Wakefield; and nearly a day was occupied, before she was examined, in examining witnesses on both sides as to the validity of that marriage by the Scotch law, to ascertain whether she were admissible as a witness or not. This, therefore, appears to be one of those matters of practice, which depend rather on the discretion of the presiding judge, applied to the particular circumstances of the case, than on any strict rule of law; of the same kind is the plaintiff's right of reply where facts are stated but no evidence actually given (*Crerar v. Sodo*, sup. 479); and the period at which one of several defendants in an action of tort, against whom the plaintiff has failed to make out any case, is entitled to an acquittal. Thus in *Wright v. Paulin*, R. & M. N. P. C. 128, Best, C. J., denied the right of a defendant to an acquittal in such a case, until all the evidence in favour of the other defendants was gone through, and the period of taking the acquittal was deferred in consequence: while in *Carpenter v. Jones*, Middlesex sittings after Trinity Term, 1828, Lord Tenterden, C. J., on a similar application, after stating that judges had certainly been much in the habit of refusing to direct an acquittal till all the other witnesses have been examined, and that it was very often right to do so, said, that he was nevertheless of opinion that the time of taking such an acquittal is in the discretion of the judge, and that it may be taken whenever it is most convenient. And accordingly, under the particular circumstances of that case, he allowed one defendant to be acquitted immediately on the close of the opening speech for the other defendants.

BARRETT v. DEERE.—p. 200.

Payment to a person found in a merchant's counting-house, and appearing to be intrusted with the conduct of the business there, is good payment to the merchant, though it turns out that the person was never employed by him.

ASSUMPSIT for goods sold and delivered.

The defence was payment. There had been some disputes between the parties as to certain deductions claimed by the defendant; and the defendant sent W. A. to pay the undisputed amount, and ordered him to deliver, at the same time, a letter stating his objections to the items in dispute. W. A. stated that he

went to the plaintiff's counting-house, that the counting-house had a part railed off, and that within that part he found a person sitting, with account books near him, and that he gave him the amount he was directed to pay, and the letter. The person to whom he gave the money and letter, opened the letter, referred to some of the books, and then said he could say nothing as to the contents of the letter; that that question might remain open, but that he would give a receipt for the sum actually paid. He accordingly gave a receipt in the following form:—

Received of J. Deere, Esq., 6*l*. 16*s*.
for Barret and Co.

W. LONG.

In fact, the plaintiff had no such person as W. Long in his employment, and the money never came to his hands; and it was also proved that no one, except the plaintiff's son, usually sat in the counting-house, and that the money was not paid to him. Some attempt was made, but with little success, to prove that A. B. had mistaken the plaintiff's counting-house. The money originally in dispute had been paid into court, and the only question now was, whether there had been a good payment of the 6*l*. 16*s*. or not?

Lord TENTERDEN, C. J. The only question for the jury is, whether the sum of 6*l*. 16*s*. was paid at the plaintiff's counting-house or not? if it was, the defendant is entitled to a verdict. If he were not, the consequences would be very serious. In a great place of business like this, no transactions could be carried on, if it were not sufficient for a purchaser to send his money to the seller's place of business, and pay it to any person whom he finds there, whether actually authorized to receive it or not, who appears to be intrusted with the conduct of the business. The debtor has a right to suppose that the tradesman has the control of his own premises, and that he will not allow persons to come there and intermeddle in his business without his authority. If, therefore, the jury are of opinion that the payment was made at the plaintiff's counting-house, their verdict must be for the defendant.

Verdict for the defendant.

Gurney and F. Kelly for the plaintiff.
Campbell and Maule for the defendant.

LEVY v. DOLBELL.—p. 202.

In an action against the acceptor of a bill of exchange, who pleaded his discharge under the Insolvent Debtor's Act, the defendant having misdescribed the holder in his schedule, and there being some evidence tending to show that he knew the holder at the time: Held, that the true question for the jury was, whether he did so know the holder?

ASSUMPSIT on a bill of exchange, drawn by Boyton, and accepted by the defendant, payable to Bailey, and endorsed by Bailey to the plaintiff.

Pleas, non assumpsit, and discharge under the Insolvent Debtor's Act.

This bill, among others, had been accepted by the defendant for the accommodation of Boyton, to whom Bailey had given value for them. Dolbell had described them correctly in his schedule, as to the parties, date, and amount; but had stated this bill to be in the hands of Mr. Isaacs of Mansel Street, Goodman's Fields, who was an attorney. In fact, it at that time belonged to the plaintiff, and was either in his hands or those of Mr. Isaacs, of Berry Street, St. Mary Axe, as his attorney, and had never been in those of Mr. Isaacs of Mansel Street. Some evidence was given to show that the defendant had been informed, about the time of his going to prison, that the bill was in the hands of Mr. Isaacs of Berry Street, as attorney for the plaintiff; the evidence, however, did not distinctly show more than that the defendant had been told that

Mr. Isaacs had the bill, without any description to show which of the Messrs. Isaacs was intended.

On this evidence *Gurney* contended that the plaintiff was entitled to a verdict. By the provisions of the statute 7 G. 4, c. 57, s. 46, the defendant is not entitled to be discharged except as against persons named in his schedule: he is bound to give notice to all his creditors; and if he does not know them, he must make that appear to the satisfaction of the court, as an excuse for not giving notice; but if he knows them at any time before the adjudication, then, by the express provisions of the statute he must insert them in his schedule. In this case there is distinct evidence that he knew the history of the bill before he filed his schedule at all, or at least before the adjudication; and with this knowledge he misdescribed the holder.

Sir *James Scarlett*. It had been repeatedly decided, (a) that if the bill is faithfully described, and the best information given as to the holder which the insolvent can give, it is sufficient, though in fact there be some inaccuracy in the description of the creditor; or even, as in the case of *Nias v. Nicholson*, in that of the instrument itself. The real question is, Whether the insolvent intended a fraud? and the true issue, whether the defendant, when he made out his schedule, purposely concealed the name of the real holder, with intent to evade opposition by him.

Lord TENTERDEN, C. J. There is evidence in this case tending to show that the defendant knew the true holder of the bill at the time that he inserted the erroneous description in his schedule. As that is the case, I think the proper question for the jury is, whether he did so or not. The evidence is by no means conclusive. If Bailey only told him that the bill was in the hands of Isaacs, an attorney, he might reasonably suppose that Isaacs of Mansel Street was the person meant, and then it will be a case of mistake; if he were told that Isaacs of Berry Street had it, then he has mis-stated the holder with knowledge who he was. There appears to be no motive for his doing so; but it is for the jury to say which of these is the truth; and in the former case the verdict must be in his favour, in the latter against him. Verdict for the defendant.

Gurney and Joshua Evans for the plaintiff.

Sir *James Scarlett* and *Chitty* for the defendant.

(a) *Forman v. Drew*, 4 B. & C. 15; *Wood v. Jowett*, ib. 20 n; *Reeves v. Lambert*, ib. 214; *Nias v. Nicholson*, R. & M. N. P. C. 322.

NAYLOR and Others v. TAYLOR.—p. 205.

A blockading squadron may lawfully lie at any distance convenient for shutting up the port blockaded, provided it does not obstruct any other; and a ship will be considered as guilty of a wilful breach of the blockade which actually comes within reach of capture by the squadron, if the circumstances were such, that a prudent man would have inquired whether that were the blockading squadron, although the captain were actually ignorant of its being so, not having inquired.

ASSUMPSIT on a policy of insurance on goods on board the ship *Monarch*, "at and from Liverpool, to any port or ports, place or places, in the river Plate; in the event of blockade, or being ordered off the river Plate, with liberty to proceed to any other port in South America." Loss by capture.

The policy was effected on the 4th of March, 1826, and the voyage commenced on the 12th of March. On the 18th of February, 1826, it had been notified in the London Gazette, that the Emperor of Brazil had instituted a blockade "of the ports in the river Plate belonging to the government of Buenos Ayres." The *Monarch* proceeded to the river Plate, and when off Monte Video, a port in that river belonging to the Brazilian government, she fell in with the blockading squadron and was captured for an alleged breach of the blockade. The Mo-

monarch could have gone to Monte Video without opposition; but evidence was given for the purpose of showing that her intention was to go to Buenos Ayres. Being ordered to Rio Janeiro for condemnation, and proceeding thither with a Brazilian crew on board, five of the English crew rose on the captors (twenty-two in number), retook the ship, and brought it to England. The recapture was on the 21st of July. In August the assured, having no notice of the recapture, gave notice of abandonment, and commenced their action in Hilary term 1827, before which time the vessel and cargo had returned to England.

Several questions were made; as to the infringement of the blockade by the Monarch; as to the right of the crew to retake the ship when she was proceeding to Rio Janeiro for the purpose of a judicial investigation of the propriety of the capture; as to the right of the assured to treat it as a total loss, when the goods were returned to them; as to the duty of sending them by another ship to their destination; as to the duty of the crew of the Monarch after the recapture, to proceed with the cargo to South America; and as to the effect of the notice of abandonment, given, as it was in fact, after the recapture, and the commencement of the action taking place, as it did after the arrival of the goods in England.

All the latter questions being matters of law, the only question on which any directions were given in this stage of the case related to the breach of the blockade.

Campbell contended that no breach was proved. It does not appear that there was any port to which the notified blockade applied nearer than Buenos Ayres itself, which was one hundred miles distant, and more, from the place of capture. A blockade cannot properly exist at such a distance; or, at least, vessels cannot understand that it does so, and are not guilty of a breach of the blockade, unless they receive notice which is the blockading squadron; and persist, in defiance of it, in attempting to go to the port in question. In this case, therefore, the Brazilian fleet should have intimated to the Monarch, the continuance of the blockade, and that it extended to the point where they were: till they did so, they had no right to take the ship, and there was no breach of the blockade.

Lord TENTERDEN, C. J. I can leave no question to the jury except this: Did the Monarch break the blockade or not? or, in other words, Ought she, when she came in sight of the blockading squadron, to have inquired whether it were such or not, and not to have pursued her voyage without gaining that information? The distance of the blockading fleet from the ports declared in blockade is certainly considerable; but I know no precise limit of distance which can be fixed. I should say, as at present advised, that the blockading fleet may lie at any distance convenient for shutting up the port blockaded, not obstructing any other; and that was the case here; Monte Video was open, and we do not learn that there were any ports not in a state of blockade higher up the river. I think, therefore, that the blockading fleet might lawfully be stationed off Monte Video. If so, as the ship left England with knowledge of the blockade, I think a prudent man would have inquired whether that was the blockading squadron. If you think that the captain ought to have done so, your verdict should be for the defendant; if not, it will be for the plaintiffs, and the other questions will remain open for discussion. Verdict for the plaintiffs.(a)

Campbell and *R. Scarlett* for the plaintiffs.

Sir James Scarlett and *Alderson* for the defendant.

Sir James Scarlett afterwards moved for a nonsuit or a new trial, on the grounds reserved at *Nisi Prius* only, and a rule was granted, which is still pending.(b)

(a) See 2 Rob. Adm. Rep. 110, *The Neptune*; 5 Rob. Adm. Rep. 76, *The Spes and Iress*; and 262, *the Shepherdess*.

(b) For the result of this rule, see 17 E. C. L. R. 480.

BEST v. SAUNDERS.—p. 208.

In cases where primage is payable by the consignee of the cargo to the master of the ship, the master may maintain an action for it, though the freight has been separately adjusted.

Where the bill of lading expressed that the goods were to be delivered to the consignee, "he paying freight for the same as per charter-party, with primage and average accustomed:"

Held, that the master was entitled to receive primage from the consignee: although the contract between the ship-owner and the agents of the consignee (there being no charter-party) was for 5*l.* per ton freight, and did not notice primage; and although the master contracted with the ship-owner to receive a sum certain "in lieu of all cabin and other allowances, to commence from the day of victualling the ship, and for which he is to mess the officers."

ASSUMPSIT for primage.

The action was brought by the captain of the ship *Albion* against the defendant, as consignee of a cargo of sugar from the Mauritius. The cargo was shipped under a bill of lading, "to Saunders or his assigns, paying freight for the said goods, as per charter-party, with primage and average accustomed," and delivery was made under Saunders's endorsement. The bills were in the common printed form, and the words quoted were in the printed part. There was in fact no charter-party, but the contract between the ship-owner and the consignee was for 5*l.* per ton freight; and nothing was said in it respecting primage or any other charges. This contract was communicated to the shippers, who were the general agents and partners of the consignee, the defendant. The ship *Albion* had originally gone out with convicts to New South Wales, and took in the cargo in question on her return homewards; and the agreement of the plaintiff with the owner, which was made before the ship left England for New South Wales, provided that the plaintiff should "receive 10*l.* per calendar month in full for wages, and 150*l.* for all cabin or other allowances, to commence from the day of victualling the ship, and for which he is to mess the chief and second officers for the whole voyage, and the surgeon outwards and also the surgeon homewards, if he bring one, and that he should receive three sicea rupees per day in full for all shore expenses during the time the ship is detained in India and New South Wales." On the arrival of the ship, the ship-owner received primage as well as freight on some goods which were shipped without any antecedent contract, and paid that primage to the plaintiff: but he settled his freight account with the defendant, by receiving the 5*l.* per ton and no more from him; and he made no payment to the plaintiff as for primage on that part of the cargo. Evidence was given as to the usage of the Mauritius trade with respect to primage; and it appeared, though not very distinctly, to be usual to receive it at the rate of 5*l.* per cent. on the freight, unless there were a stipulation, or something amounting to one, to the contrary. In practice, primage, when due, was generally included in the freight account, and balanced with it.

Sir James Scarlett for the defendant. There are many objections to the plaintiff's recovery in this case. He can maintain no action for primage by itself, even if it be due; but either he must sue for freight as the owner's agent, and then he may include his primage, or the owner may sue for freight and primage, and then he will be accountable to the master for the latter. But here no primage is due. The bill of lading does not make it so. It is a contract by the master who signs it to deliver on certain terms; but it is no contract on the part of the defendant, and he, therefore, is not bound by the words "with primage and average accustomed;" and if he is, those words in the printed form must be understood merely to mean that the primage, if any be due, shall be paid at the usual rate, not to affect the question whether any is due at all. That question, by the words of the bill of lading itself, if that is binding, depends on the charter-party, or the contract, which is equivalent to it; and of course, if the bill of lading is not binding, the contract between the shipper and owner is to give the rule. That contract is for a payment of 5*l.* per ton simply, and therefore excludes all other charges; and, in fact, the amount has been settled on that footing, without any claim for primage. But even if there were any right to primage, as

between the owner and the defendant, the plaintiff can have no claim, for he has agreed to take a sum certain in lieu of his allowances, and primage is one of them. On all these grounds the action must fail: the primage and freight cannot be separated; the defendant has entered into no contract to pay primage, but, on the contrary, is to pay a fixed sum, which does not comprehend it: and the plaintiff, at all events, is not entitled to receive it, for he has taken a fixed sum in lieu of it.

F. Pollock for the plaintiff. There is no reason why two contracts should not be considered to arise on the bill of lading; one to pay freight to the owner, the other to pay primage to the master. The master generally has that right, and it is provided for here by the bill of lading. It is not affected by the agreement between the merchant and the owner, for that does not exclude the master's right to primage, though it does not provide for it. And the agreement between the plaintiff and his owner does not affect it, for the "other allowances" there spoken of, the only words which can possibly be applied to it, must, in sound construction, be held to mean other allowances in the nature of cabin and shore money; and if so, they have nothing to do with primage.

Lord TENTERDEN, C. J. A party taking goods under a bill of lading must be considered as receiving them on the terms of that bill. The argument, therefore, that the defendant has entered into no such contract, fails. The terms of the bill of lading state that the delivery is to be on the payment of primage and average accustomed. That at least throws on the defendant the burden of proving that there were circumstances to defeat the operation of these words: for I am of opinion that the plaintiff, if entitled to receive primage, may maintain this action for it, although the freight has been separately adjusted. Primage is an old charge, and clearly in its origin payable to the master. It is called in old books *hat money*, and *la contribution des chausses ou pot du vin du maitre*; phrases which clearly refer to a personal collection by the master; and I am sure there are old precedents, like the present, of actions brought by the master for primage only. Still the defendant may show circumstances to defeat the master's right. If, by the contract between the owner and the master, the master is not to receive primage, he can maintain no action for it, whatever the owner may; and I think that cases, also, may arise, when a contract between the owner and shipper, which excludes primage, may be brought to the knowledge of the master, and prevent him from having any right to claim it. It is a question for the jury, whether either of these defences is substantiated here; I incline to think they are not. The words "other allowances," especially when we look to the time at which the services to be rendered in return for them are to commence, and the nature of those services, seem rather to refer to allowances like cabin and shore money than to those of a different description; and if so, that agreement does not touch the question of primage. The contract between the owner and merchant stipulates for freight at 5*l.* per ton; and though it says nothing about primage, it does not expressly exclude it. This contract is communicated to the agents of the merchant, and they ship the goods without striking out the words "with primage and average accustomed." The bill of lading, which contains those words, is strongly in favour of the plaintiff's claim: it is for the jury to say whether their operation is defeated.

The jury, which was special, intimated a strong opinion that, wherever primage was not to be paid, the usage was to strike out those words, and immediately found a verdict for the plaintiff.

F. Pollock and *Holt* for the plaintiff.

Sir James Scarlett, Parke, and Rumball, for the defendant.

A motion was afterwards made for a new trial, on all the grounds taken at *nisi prius*, but the court refused to grant a rule.

LONGMAN, REES, ORME, BROWN, and GREEN, v. POLE, THORNTON, FREE, DOWN, and SCOTT.—p. 223.

If a person colludes with one partner in a firm to injure the other partners, those others can maintain a joint action against the person so colluding.

THIS was an action on the case, charging that the plaintiffs, and one Thomas Hurst, carried on business in co-partnership as booksellers, and that the defendants were employed and acted as the bankers of the firm; that Thomas Hurst fraudulently and without the knowledge of the plaintiffs, issued certain promissory notes, and accepted certain bills in the name of the firm, payable at the banking-house of the defendants, and furnished the defendants with the moneys to pay the said notes and bills, without the knowledge of the plaintiffs; that the defendants fraudulently and injuriously combined and conspired with the said Thomas Hurst to keep the plaintiffs in ignorance of the said notes and bills, and to prevent them from knowing that the said Thomas Hurst was so using the name of the firm in such bills and notes, and that in pursuance of such conspiracy, the defendants omitted to enter the notes and bills so paid in the pass-book of the plaintiffs. The counts then stated as special damage, that the plaintiffs paid the said Thomas Hurst 10,000*l.*, as part of his share of the partnership funds, and shortly afterwards dissolved partnership with the said Thomas Hurst, and paid him 30,000*l.* as the remainder of his share; which said sums the plaintiffs would have retained to answer outstanding liabilities of the firm, on notes and bills so issued by the said Thomas Hurst, if they had known that the said Thomas Hurst had so used the partnership name. And that after the said dissolution the plaintiffs were obliged to pay the sum of 20,000*l.* on notes and bills so issued by the said Thomas Hurst without their knowledge, he having become bankrupt before the notes and bills became due and were presented for payment.

There was a second set of counts not relied on at this trial, omitting the conspiracy, but stating the duty of the defendants as bankers, to enter such transactions in the pass-book, and stating the same special damage in consequence of the breach of that duty.

One of the objections relied on for the defendants was, that the plaintiffs could not maintain this action in their joint names, they having no joint capacity, independent of Thomas Hurst, by whose order the omission took place, and no joint partnership fund of their own, distinct from him, at the time of the tort charged, and therefore it could not be to their joint damage.

Lord TENTERDEN, C. J., in summing up, said, I think in point of law this action is maintainable; if a person colludes with one partner in a firm to enable him to injure the other partners, I think they can maintain a joint action against the person so colluding.

His lordship then left the case upon the merits as to the conspiracy to the jury, who found a verdict for the defendants.

*Sir James Scarlett, Brougham, Campbell, and Crowder, for the plaintiffs.
Gurney, F. Pollock, and Parke, for the defendants.*

KENNEDY v. GAD.—p. 225.

[S. C. 3 Carr. & P. 376.—14 E. C. L. R. 356.]

An action to recover the deposit as a bet on a wrestling match ought not to be tried, though the match had gone off, and the defendant, a stakeholder, had promised to repay the money.(a)

(a) See *Egerton v. Furzman*, R. & M. N. P. C. 213, and the note there. At the Summer assizes 1828, Bayley, J., tried a cause involving a similar question; and on a motion in the following term for a new trial, Lord Tenterden, C. J., stated, that it was his practice never to try such causes; and Bayley, J., expressed regret that he had done so, and said that he had

refused to try it till he had disposed of every other cause in the paper. Notwithstanding these decisions, it has been recently determined by Bayley, Holroyd, and Littledale, Ja., that the deposit on an illegal wager may be recovered from the stakeholder, either where the event has not happened or where the depositor has given notice to the stakeholder not to pay it over. *Hastelow v. Jackson*, 8 B. & C. 221. The practice of postponing the trial of such a cause to all others is consistent with the general control which the judge has over the order of business; but it would seem impossible to reconcile an absolute refusal to try a cause, with a legal right of action existing in the party bringing the cause into court.

PIKE v. STREET.—p. 226.

An endorsee of a bill or note taking it under an agreement not to sue the endorser cannot sue such endorser, though the endorsement be unqualified.

THIS was an action by an endorsee against the drawer and endorser of a bill of exchange.

The defence was, that though the plaintiff had given full value for the bill to Street the defendant, yet it was under an agreement that he should sue Miles the acceptor to the bill only, and should not sue the defendant as endorser. The agent of the defendant, who negotiated the bill with the plaintiff, said that the plaintiff took it under a verbal agreement to that effect. It was contended for the plaintiff, that such an agreement was invalid, and contrary to the nature of a transfer by an endorsement, which was general and unqualified.

Lord TENTERDEN, C. J., in summing up, left it to the jury to say whether or no the plaintiff took the bill on the terms and conditions that he should have recourse to Miles and him only, and not sue Street at all; if so, they should find for the defendant, such an agreement being a good bar to the action; if they did not believe that, then their verdict should be for the plaintiff.

Verdict for the plaintiff.

Campbell and Rowe for the plaintiff.

Gurney and Chitty for the defendant.

The party transferring a bill may endorse it sans recours, and this will protect him against subsequent endorsees. Per Dallas, J., in *Goupy v. Harden*, 7 Taunt. 163. The principal case decides that a verbal agreement not to hold the endorser liable, would bar an action by the party making the agreement; but, upon the general negotiability of bills, it would seem to be no protection against a subsequent bona fide endorsee, without notice of such agreement. See the cases collected in *Chitty on Bills*, p. 139, 7th edition.

BANN v. DALZEL.—p. 229.

[S. C. 3 Carr. & P. 376.—14 E. C. L. Reports.]

Interest cannot be recovered on a judgment if the plaintiff might, by proper diligence, have procured payment.(a)

(a) In *Arnott v. Redfern*, 3 Bing. 353, which was an action on a judgment in a Scotch court, the Common Pleas decided that interest ought to be allowed. "However a debt has been contracted, if it has been *wrongfully withheld* by a defendant (after the plaintiff has endeavoured to obtain payment of it), the jury may give interest in the shape of damages for the unjust detention of the money." "Our law would not do what it professes to do, namely, provide a remedy for every act of injustice, if it did not allow damages to be given for interest, when a creditor has been kept out of his debt (he using all proper means to recover it) by his debtor." Per Best, C. J., *id. ib.* And even on bills of exchange the jury may refuse to give interest when "the delay of payment has been occasioned by the default of the holder." Per Bayley, J., in *Cameron v. Smith*, 2 B. & A. 308. *Du Belloix v. Ld. Waterpark*, 1 D. & R. 16. And this would seem to be the only answer, that can be set up to the claim of interest, on bills of exchange and promissory notes. In *Laing v. Stone*, sittings after Trinity Term, 1828, coram Bayley, Holroyd, and Littledale, Ja., which was an action on a promissory note at three months after date, the court discharged a rule which had been obtained by Merewether, Serjt., to set aside the verdict for the

plaintiff on the ground of misdirection. The action had been brought for the interest only, the principal having been paid by instalments. It was attempted at the trial to show, that the action was really brought by the attorney in the cause for his own benefit, and without the sanction of the plaintiff, the payee of the note; with other circumstances of the same description, calculated to induce a jury not to give damages. The learned Judge, Gaselee, who tried the cause at the preceding Taunton assizes, had directed the jury to give interest, unless they believed it had been paid. The note did not carry interest on the face of it; and *Mere-weather*, Serjt., contended, on the authority of *Du Belloix v. Ld. Waterpark*, that it was matter for the jury whether or no they would give interest, and that it ought to have been so left to them.

BAYLEY, J. The direction of the learned Judge was perfectly right. The general and common rule is, that bills and notes carry interest; and it would be highly inconvenient to leave it to the caprice of a jury to give or withhold it at their pleasure; it would be introducing confusion where there ought to be certainty. There may be cases of very extraordinary circumstances, such as where it is the holder's own fault that he has not been paid, in which the jury should be directed not to give interest (which, in this case, is in the nature of damages, and not the debt itself), and of this description was the case referred to; there the holder had resided abroad, and kept the note for many years without any demand; and the jury were at liberty to say, under such circumstances, that interest ought not to be demanded. But I am not aware that it has ever been refused in cases in which the holder was not himself in default. HOLROYD and LITLEDALE, Js., concurred.

Moody, who was to have shown cause, was not called on by the court.

When, therefore, the claim for interest does not rest on express contract, diligence to procure payment of the debt seems to be a condition to the claim.

SITTINGS IN AND AFTER TRINITY TERM, IN C. P.

9 GEO. IV.—1828.

BROAD v. PITT.—p. 233.

[B. C. 3 Carr. & P. 518.—14 E. C. L. Reports.]

A communication made to an attorney or counsel is not privileged unless made with a view to a judicial proceeding either commenced or apprehended.(a)

(a) It would seem that the rule is not (as it is often put) founded on a consideration of the importance of the communications made to attorneys; nor on any purpose of protecting the general business which attorneys are employed to carry on. The object of the rule appears to be the proper conduct of judicial investigations, to which the full and free disclosure of the client to his professional advisers is essential. As far as advocacy is considered necessary to the production of truth and justice on such occasions, so far is it important that such communications be unrestrained by the fear of subsequent disclosure. The current of authorities (many of which may be seen collected in *Phillips on Evidence*, 6th edition, vol. i. p. 134, and in the notes to *Parkhurst v. Lowten*, 2 Swanst. Rep. 199, 200) certainly seems opposed to the ruling in the principal case; but the opinion of Lord Hardwicke, in *Vaillant v. Dodemead*, 2 Atk. 524, is in accordance with it.

BEVAN v. WATERS.—p. 235.

Where notice to produce a letter has been served, the attorney for the opposite party may be asked, whether he has that letter, in order to let in secondary evidence of it, if not produced.

ASSUMPSIT for goods sold and delivered, and work and labour.

Notice to produce a particular letter had been served the day before the trial, the party living more than one hundred miles from London; and *Wilde*, Serjt., called the defendant's attorney, and asked him whether he had that letter in his possession.

This was objected to by *Jones*, Serjt., for the defendant, as a violation of the rule as to privileged communications.

BEST, C. J., said, that he recollected that Lord Mansfield had decided that an attorney was bound to answer the question; the object was to let in secondary evidence, in case it was not produced; and therefore he thought the question right to be answered. (a)

(a) The main question in this case will be found more fully reported in 3 Carr. & P. 520, S. C. 14 E. C. L. R. 424.

DOE, on the demise of LAMBLE, v. LAMBLE.—p. 237.

The plaintiff in ejectment is bound to produce the rule to confess lease, entry, and ouster, as part of his case.

SITTINGS AFTER MICHAELMAS TERM, IN K. B

9 GEO. IV.—1828.

MANN v. LENT.—p. 240.

In an action by the endorsee against the acceptor of a bill of exchange, the defendant may show that the bill was originally given without consideration, though he has given no notice of disputing the consideration.

ASSUMPSIT by the endorsee against the acceptor of a bill of exchange.

The defence was, that the bill was originally an accommodation bill; and a notice to dispute the consideration had been given, but only on the evening of the day on which the cause was to have been tried, and only thirty-six hours before the cause actually was so.

F. Pollock, for the plaintiff, objected to the receipt of the defendant's evidence, on the ground that this notice was insufficient.

LORD TENTERDEN, C. J. I think no notice is necessary. The evidence tendered is material to the issue on the record; and I have no right to exclude it. It is matter of comment if no notice were given, or if it were not given at a reasonable time; but I do not think the evidence should be shut out on that ground.

Verdict for the plaintiff, subject to a special case on other points.

F. Pollock and *Coltman* for the plaintiff.

Gurney and *Chitty* for the defendant.

The same rule is laid down generally in Phillips on Evidence, 6th edit. vol. ii. p. 18; and as the practice in the King's Bench, in Starkie on Evidence, part iv. p. 253; and in Chitty on Bills, 7th edit. p. 401. In the Common Pleas the defendant cannot by showing that the bill was void in the hands of a prior holder, as having been lost or obtained by fraud, call upon the plaintiff to prove the consideration he gave for it, unless he has first given notice that he will require him to do so. Paterson v. Hardacre, 4 Taunt. 114. It does not appear what the practice of that court is, when the bill is originally void for want of consideration; although in Selwyn, N. P. 358, 6th edit., the rule is stated generally for all courts, and in Chitty on Bills, 7th edit. 401, for the Court of Common Pleas, that the defendant cannot object to the want of such proof by the plaintiff unless he has given notice that he shall require it.

See also Wyatt v. Campbell, sup. 257.

PECKHAM and Another, Assignees of ADAMS, a Bankrupt, v. LASHMOOR and Another.—p. 251.

A transfer of goods in warehouse by a bankrupt to A. & Co. by mistake for A. & Son, more than two months before the issuing of a commission, but corrected within two months, vests the property in the goods in A. & Son from the time of the first transfer, under the 81st section of 6 G. 4, c. 16.

A commission issued and not acted on nor gazetted, is sufficient to defeat a transaction within two months of it, under the proviso of the 81st section.

EDWARD CHUCK, BENJAMIN WOOD, and WILLIAM DEACON, Assignees, &c., of J. C. STARKEY, v. THOMAS FREEN.—p. 259.

A deposit of private deeds by one partner made under a written agreement to secure payments made for him, will cover payments made on behalf of the firm, if there be evidence that the deposit was really made in respect of the partnership debts.

TROVER for the recovery of certain title-deeds deposited by the bankrupt with the defendant.

The bankrupt was one of the firm of Starkey & Co., brewers, who had been indebted in a large sum of money to a person of the name of Barron, for malt. In 1824 Barron, the Defendant Freen, and another, called upon the bankrupt to make some arrangement with a view to the gradual liquidation of the account; and it was then agreed that the bankrupt should deposit the deeds in question, which were part of his private property, with the defendant, under a written agreement, and that Barron's account should be reduced by bills on Starkey & Co. at the rate of 100*l.* per month, which the defendant Freen was to negotiate.

The letter containing the above-mentioned agreement was as follows:

“ Mr. T. Freen.

“ Sir,—You have requested me to afford you security in the dealings which you have with me, I have this day deposited in your hands the title-deeds to lands and property in Cheshire, together with the lease of two houses situate in Moor street, St. Ann's, which I agree that you shall hold as a security for any sums of money which you may at any time, and from time to time, pay, or be liable to pay, or guaranty to pay for me, with interest and commission, and other lawful charges, not exceeding the sum of 5,000*l.*, and I engage on request to execute at my charges a good and valid mortgage to you of the lands, &c.

“ Yours, &c.,

J. C. STARKEY.

‘ 11th October, 1824.’

The defendant claimed to hold the deeds by reason of some bills drawn by Barron on Starkey & Co. under the above arrangement, which the defendant had endorsed in order to get discounted, and had been compelled to pay to the holder.

On the part of the plaintiffs, it was contended that the letter containing the agreement of deposit, was in terms confined to private transactions between the defendant and the bankrupt, and would not warrant the detention of the deeds for payments made on behalf of the partnership; and that the above evidence was not admissible to show that the dealings alluded to were partnership transactions; and the case *Ex parte Freen and Morrice*, 2 Glyn & Jameson's Reports, p. 246, was cited, in which the Vice-Chancellor (Sir L. Shadwell) had refused to establish a lien on the deeds in question, upon a petition founded on the very same letter of guarantee.

Lord TENTERDEN, C. J., admitted the evidence, and held that it established the lien claimed by the defendant. Nonsuit.

Sir J. Scarlett, and Smirke, for the plaintiffs.

Pollock and Wightman, for the defendant.

In the report cited, the Vice-chancellor is represented to have founded his judgment on the following reason, viz. that “the expressions in the letter apply throughout to J. C. Starkey

only; that if the petitioner's (Freen's) argument prevailed, there was no limit to the partnership or joint liability to which it might be extended. That it might be extended to money advanced to another partner on account of the partnership, without the concurrence or knowledge of J. C. Starkey."

It may, however, be observed, that the deposit was confined to certain dealings referred to in the letter, and in the view of the parties at the time of the agreement. The letter itself gave the defendant no authority to incur liability on behalf of the bankrupt, by endorsing bills or otherwise. The contemporary parol arrangement, in pursuance of which the defendant endorsed the bills, was an extrinsic and collateral fact, admissible in evidence in order to prove that the defendant had incurred the liability at the request of the bankrupt, and the admission of this evidence necessarily restricted the lien to the transactions in contemplation of the parties when the agreement and the deposit were made.

See also *Garrett v. Handley*, 4 B. & C. 664, in which it was held that several partners might sue on a letter of guarantee given to one of them, evidence having been received to show that it was given for the benefit of the firm.

HISCOCKS v. JONES, Esquire.—p. 269.

In an action for an escape, on final process, the defendant may show, on the general issue, that the escape was by the fraud and covin of the party really interested in the judgment. Or if he plead that it was by fraud and covin of a person unto whom and to whose use and benefit the judgment was assigned, this is sufficiently proved by showing that the judgment was assigned to the use and benefit of that person, though the assignment was in form made to another.

DEBT against the marshal of the King's Bench prison, for the escape of one Kemp, a prisoner in execution. Pleas: 1st, Nil debet. 2dly, That the escape was with the consent of the plaintiff. 3dly, That the escape was by fraud and covin of the plaintiff. 4thly, That the judgment had been assigned to Simmons, and that the escape was by fraud and covin of Simmons. 5thly, That the judgment had been assigned unto, and to the use and for the benefit of a person unknown to the defendant at the time of pleading, and that the escape was by fraud and covin of the said person unknown. The replication to each plea took issue on the consent or fraud.

The judgment had been assigned to Simmons, but the party really paying for it was one Lockley, and evidence was given to show that Kemp had been inveigled out of the rules of the King's Bench prison by a message left for him by Lockley, who falsely used the name of a friend of Kemp's, and requested to see him at his solicitor's, which was out of the rules. Kemp went accordingly, and Lockley immediately had the declaration in the present action filed against the marshal.

Taunton, for the plaintiff, objected that this evidence did not support any one of the pleas. Simmons was the person to whom the judgment was assigned; but there is no fraud or covin in him: the fraud, if any, is in Lockley. The fourth plea, therefore, fails, for there is no fraud in Simmons. The fifth fails, because there was no assignment to Lockley, the party supposed to be guilty of the fraud.

BAYLEY, J. I think I must leave the question to the jury, whether the plaintiff did go beyond the rules in consequence of Lockley's conduct. The judgment appears to have been assigned to the use and for the benefit of Lockley; and I think that is enough to substantiate the fifth plea, though the assignment was not made in form to him. The substance of the plea is, that the escape was by the covin of the party really interested in the judgment. I incline also to be of opinion that that defence is open on the general issue.

Verdict for the defendant.

Taunton, Patteson, and Follett, for the plaintiff.

Sir J. Scarlett, Gurney, and Campbell, for the defendant.

In Hilary term, 1829, *Taunton* moved on affidavits for a new trial, on the ground of surprise, and that the verdict was contrary to the real facts of the case. No question was made as to the ruling of the learned Judge at Nisi Prius, and the rule moved for was refused.

REX v. WHITE.—p. 271.

A party filing a bill for an injunction, and making an affidavit of matters material to it, is indictable for perjury committed in that affidavit, though no motion is ever made for an injunction.

INDICTMENT for perjury.

The defendant had filed a bill in Chancery for an injunction, and had made the affidavit on which the perjury was assigned, in support of the allegations in that bill. The indictment averred the bill to have been filed, and the affidavit exhibited in support of it; and it stated the matters assigned as perjury to be material to the questions arising on the bill. It did not contain any statement that a motion had been made for an injunction, and it did not appear that any had been.

The counsel for the defendant, on ascertaining that it was not intended on the part of the prosecution to give evidence that any such motion had been made, submitted that the defendant was entitled to an acquittal. By the practice of the Court of Chancery an injunction cannot be obtained except for want of an answer, or on the insufficiency of the answer, or on evidence disproving the answer, in none of which cases is the affidavit of the plaintiff admissible: or else, *ex parte*, before the time allowed to the defendant for answering has elapsed. In the last case, and in that only, can the plaintiff's affidavit be used. The averment, therefore, that the perjury is assigned on matter material to the bill, is not true; it can only be material to an application of a peculiar nature, and it does not appear and is not alleged that such an application was ever made. A plaintiff at common law might choose to accompany his declaration with an affidavit of its truth, and it is possible that that affidavit might afterwards become available in some matters arising out of the cause; but, till it did so, it would be mere waste paper, and it would be necessary to show that it had become other.

Sir *J. Scarlett* observed, that the objection, if it were tenable at all, amounted to this, that perjury could not be assigned upon an affidavit which had not been used; (a) when

Lord TENTERDEN, C. J., interposed, and said, I am not disposed to stop the cause on this objection: if good, the defendant seems entitled to take it upon the record; but I do not think the averment or proof, the absence of which is objected to, can be necessary. The statements in the affidavit are material to the matters contained in the bill, which is for an injunction; and it may well have been filed in anticipation of a contemplated motion for an injunction, on which it might have been used. Can it make any difference that it afterwards turns out that the motion is not made? The crime, if any, is the same, morally, in each case; and I certainly shall not, where the objection is open hereafter, hold it necessary to give proof of a fact which does not vary the conduct of the party in taking the oath in question. The defendant was acquitted.

Sir *James Scarlett*, *Campbell*, and *Brodrick* for the prosecution.

Gurney, *F. Pollock*, and *R. V. Richards* for the defendant.

(a) See *R. v. Hailey*, R. & M. N. P. C. 94, where *Littledale, J.*, held a party indictable for perjury in an affidavit, which, from certain irregularities in the jurat, could not be used in the court in which it was sworn.

COTTON v. JAMES, Gent., one, &c.—p. 273.

[S. C. 3 Carr. & P. 505.—14 E. C. L. Reports.]

In trespass for entering plaintiff's dwelling-house and taking his goods on a plea justifying the trespass by proceedings under a commission of bankruptcy, and replication taking issue on the act of bankruptcy, the defendant is entitled to begin.

Letters, bearing post-marks before the act of bankruptcy, and found in the alleged bankrupt's possession after it, containing statements of matters material to the act of bankruptcy, are admissible without calling the writer as evidence against the alleged bankrupt, to show that he received intimation of these facts, though not to prove their truth.

A fraudulent delivery of goods is not an act of bankruptcy, unless it be in the nature of a gift or transfer; so that when goods are removed with intent to delay a creditor, but the party to whose custody they are given has no claim given to him over them, this is not an act of bankruptcy.

At all events such delivery of goods by his agent, carrying on his business, without his direction, is no act of bankruptcy.(a)

(a) This case seems to complete the series of those by which the doctrine that the plaintiff is entitled to begin, where he has to prove damage sustained, have been for the present overruled. It goes far beyond those which preceded it, with the exception of *Bedell v. Russell*, R. & M. N. P. C. 293, in the application of the rule. In *Fowler v. Coster* (14 E. C. L. R. 391), the damages were matter of computation, such as would have been referred to the master on a judgment by default; and in *Cooper v. Wakley* (14 E. C. L. R. 395), though the rule laid down extended in terms as far as that laid down in the principal case, and though the damages were completely unliquidated, yet the nature of the injury appeared fully on the record, and it was not necessary for the plaintiff to give any evidence to enable the jury to assess the amount of compensation which he ought to receive. In the present case, on the other hand, it was absolutely necessary for the plaintiff to do so, to entitle him to recover more than nominal damages; and to give evidence which might lead to much investigation, to enable him to recover more than the value of the goods taken: and the importance of this evidence will appear from the fact, that the value of the goods taken was only about 160*l.*, so that no less than 240*l.* was recovered on it.

The practice appears now to be completely settled by decisions; but there are some circumstances which render it rather doubtful whether it will long continue so. It certainly has been understood that the inclination of the principal practitioners at the bar is not favourable to the rule as now laid down; and it will be observed that, even after the recent decision in *Cooper v. Wakley*, the counsel for the defendant in the principal case chose rather to ask the privilege of beginning as an exercise of the discretion of the presiding judge, under the circumstances of the particular case, than to claim it as a matter of strict right on the form of the pleadings. It will also be observed that Lord Tenterden, though he treated the case as one decided by binding practice, intimated something more than a doubt of the expediency of that practice; and that the same learned judge, in the recent case of *Fowler v. Coster*, laid down a very different rule as, in his opinion, the most convenient. Best, C. J., also, in the case of *Bedell v. Russell*, treated the practice as established, but said that he should have decided otherwise, had the question been open. Under these circumstances it is impossible not to entertain some doubt whether the rule now existing will long be recognised.

It may, therefore, be allowable to consider what, in the event of the present rule being again called in question, would be the most desirable practice to establish. The present rule seems to have little to recommend it, except its simplicity, and the ease of applying it; for the reason given by Bayley, J., in *Jackson v. Hesketh*, 2 Stark. N. C. P. 518, and adopted by Lord Tenterden in *Cooper v. Wakley*, "that the question of damages never arises until the issue has been tried," is inapplicable to the largest proportion of cases; namely, all those in which, at the close of the defendant's evidence, it is doubtful, whether this plea is supported or not. In all these instances, the plaintiff's evidence, according to the present practice, goes not only to disprove the issue, but also to show the damage sustained: and the jury have both questions left to them at once, though the one only becomes material on the determination of the other. Even in cases where the reasoning of the learned judge applies, it may be doubted whether the advantage sought to be attained by the practice adopted is not counterbalanced by the necessity which it imposes upon the jury, after the issue joined is disposed of, to enter on a completely new investigation in the nature of a writ of inquiry, without giving the plaintiff the same advantages to which on a mere writ of injury he is entitled: and the other inconveniences of the present rule are obvious, in the increased length of proceedings occasioned by the necessity, in many cases, of allowing the defendant to give evidence, after he has closed his original case, in opposition to the proof of damage produced by the plaintiff, on which evidence, of course, the plaintiff must have an opportunity of replying; and in the power which the rule gives a defendant, in cases, where nothing but the amount of damages is really in dispute, of putting an untenable defence upon the record, and thus getting the opportunity at all events of being heard last upon the question of damages, contrary to the general practice where he gives evidence in reduction of them. It may be of no great importance to the interests of justice, whether the privilege of reply be generally given to the plaintiff or defendant; but it is, that the rule, as far as possible, should give the parties the same rights in all really similar cases.

The only rule at all equal to that at present established in point of simplicity, and the ease of its application, would be that the plaintiff should begin in all cases, but it is obviously impossible to adopt this; for the nature of the defence may well be such that the plaintiff can

neither anticipate nor controvert it, but only wait to see whether the defendant can substantiate it in proof. In all these cases, it is obviously necessary, as a matter of convenience, that the defendant should begin. Some intermediate rule, therefore, appears to be desirable; and it would probably be difficult to find one more convenient than that stated by Lord Tenterden in the case of *Fowler v. Coster*. The great object appears to be, that the rule should not extend to cases where the defendant will have to give evidence in reply to the plaintiff's proof of damage. When he gives no such evidence, the plaintiff, if the cause turned on the amount of damage only, would at all events only be heard once, and the defendant would be heard last; in those cases, therefore, the course of proceeding on that subject is not altered by the defendant's being allowed to begin in support of that issue, on which, if it could stand absolutely alone, he clearly ought to have that privilege. Where, on the contrary, he has to give evidence in reduction of damage, it is desirable that he should not indirectly gain an advantage in dealing with that evidence, to which he is not, in common cases, entitled.

It is obvious that any rule established on these principles would leave the plaintiff in possession of the right of beginning in such a case as the principal case; and probably in such a case as *Cooper v. Wakley*, although there the whole injury appeared on the record; for even there material evidence as to the damages might be given by each party, particularly as to the degree of publicity given to the libel. The defendant would be entitled, in cases where the plaintiff's claim is not exactly liquidated, but yet is defined, as in an action for goods sold and delivered, to begin on admitting the whole amount claimed, as he was allowed to do in *Lacon v. Higgins*, 3 Stark. N. P. C. 178. It is not worth while to go through the list of decisions on the subject, and examine how far the rule in *Fowler v. Coster* would warrant, as it generally would, the practice adopted in each instance; but it may be worth while to observe that the case of *Fowler v. Coster* itself was perhaps one of those in which its application would be questionable. It was considered in *Pasmore v. Bousfield*, 1 Stark. N. P. C. 296, that the question as to damages was the same on a plea in abatement as it is on a writ of inquiry; and it would seem that, on a writ of inquiry, any evidence admissible on the general issue in reduction of damages, as payment of part only (not set-off of part, 14 East, 578, *Caruthers v. Graham*), would be admissible. The practice of the production of the bill of exchange on the execution of such a writ, that the jury may see whether there be any endorsement of payment on it, points the same way: and the practice of referring it to the master to compute principal and interest, does not affect the question; for the defendant, if he does not object to the rule so to refer it, may be considered to admit that he has made no payment. There was no such defence in *Fowler v. Coster*, and the point was not made.

REX v. WATTS and Another.—p. 281

A man carrying on a noxious business in a place where it has been long established, is indictable for a nuisance, if *the mischief* is increased by the manner or extent in which he carries it on; not otherwise, although *the business* has increased in amount.

INDICTMENT for a nuisance in carrying on the business of a horse-boiler.

The business, which is one of the most offensive description, had been carried on on the same premises for many years before the defendants came to them: but its extent was much greater under them than it had been before. On the part of the defendants it was shown, that the neighbourhood in which it was carried on was full, at the time when they commenced the business, and long before, of establishments for carrying on trades of the most offensive character; that there were other horse-boilers, melters of kitchen grease, makers of musical strings, &c., and evidence was given for the purpose of showing that the defendants carried on their trade in so improved a manner, that, notwithstanding its increase in amount, the neighbourhood was not at all, or very little, more annoyed by it, than it had been before they came there; and the case of *R. v. Neville, Peake*, N. P. C. 91, was relied on to show that, under these circumstances, the defendants were entitled to an acquittal. There was conflicting evidence as to the increase of the annoyances: and it was not contended on the part of the prosecution that the nuisances which had existed up to the time when the defendants commenced business, were themselves, under the circumstances of the case, indictable.

LORD TENTERDEN, C. J., observing that there was no doubt that this trade was in its nature a nuisance, said that, considering the manner in which the neighbourhood had always been occupied, it would not be a nuisance unless it occasioned more inconvenience as it was carried on by the defendants than it had done before. He left it, therefore, to the jury to say, whether there was any

increase of the nuisance: if, in consequence of the alleged improvements in the mode of conducting the business, there was no increase of annoyance, though the business itself had increased, the defendants were entitled to an acquittal; if the annoyance had increased, this was an indictable nuisance, and the defendants must be convicted.

Guilty.

Gurney and Comyn for the prosecution.

Brougham and Holt for the defendants.

CROSLY v. BEVERLEY.—p. 283.

A specification of a patent is to be understood according to the acceptance of practical men at the time of its enrolment. Therefore, when a specification stated that the apparatus mentioned would extract gas "from any substance from which gas capable of being employed for illumination can be extracted by heat," and the apparatus was not suited to extract gas from oil, it was held that this did not avoid the patent, oil not then being considered fit for the manufacture of gas for lighting towns, though it was then known as a chemical fact that gas might be produced from oil by heat, and this property has been since applied to purposes of illumination.

CASE for the infringement of a patent.

The patent was for an improved gas-apparatus, and it comprised four inventions: a retort, a purifying apparatus, a meter, or instrument for ascertaining the exact quantity of gas supplied from a particular gasometer or to a particular purchaser, and a governor, or instrument for regulating the same supply, and making it uniform. The invention infringed was that of the meter.

In the introductory part of the specification, Clegg, the original patentee, used these words, "My improved gas-apparatus is for the purpose of extracting inflammable gas by heat from pit-coal, tar, or any other substance from which gas or gases, capable of being employed for illumination, can be extracted by heat;" and then went on to mention the other inventions. In the description of the retort, he called it "a horizontal flat retort, in which coal, or other materials capable of producing inflammable gas, are heated, and the gas extracted by distillation;" and, in the course of it, he spoke of the "coal or other substance" being "spread in a thin layer." Throughout the description of the retort, and the explanation of the drawings, he always spoke of "coal," or "coal or coke," or "coal or other substance," only.

It appeared that the retort was incapable of obtaining gas, except very imperfectly, or by considerable modifications, from oil. The date of the patent was December 9, 1815, that of the specification, June 8, 1816. At those periods it was known, as a philosophical fact, that gas was producible from oil; but it had not been proposed to manufacture such gas for purposes of illumination. Some speculations, indeed, were then going on, and a patent was obtained about the same time for making it; and the manufacture was subsequently brought into use, though not very generally.

Brougham, for the defendant, submitted that the unfitness of the retort for making gas from oil was fatal to the patent. It is the duty of the patentee not to overstate the limits within which his invention will be useful, that no person may be led to unavailing expense in trying it upon purposes for which it is unfit. Now the specification states the retort to be fit for extracting gas from coal, tar, or any other substance from which it may be obtained; but it fails in the case of oil. It may be said that the other substances must be understood to be of the same kind as those previously mentioned; but this will not assist the plaintiff, for oil may be considered as of the same nature with tar. It might, indeed, be wrong to defeat a patent on account of discoveries subsequently made, which occasioned its words, although supposed to be correct at the time, to become too comprehensive before its expiration; but here the possibility of extracting

gas from oil was already known ; and it is immaterial that little practical use had been made of the knowledge.

Lord TENTERDEN, C. J. I must look at the whole of the specification together ; and, doing so, I think it is evident that it only represents the retort as suited to materials of the same kind as coal. I am of opinion, also, that I ought to understand the "other substances" mentioned, to signify substances then known to be available for the purpose of illuminating with gas, not everything which will burn with a flame ; for all these, in a certain sense, will produce gas. It is clear, on the evidence, that oil was not then generally considered as such a substance ; and the fact that some speculations were going on at the time with respect of its being so, will make no difference. The patentee cannot be required to foresee the success of those speculations, if they have succeeded ; but I must consider him, as a practical man, to have spoken of things which practical men then treated as usable for the purpose specified. On both grounds, therefore, I must decide against the objection. The law is severe enough in breaking up patents altogether for a fault in any part of them, without straining it in favour of such an objection. Verdict for the plaintiff.

Sir J. Scarlett, F. Pollock, Alderson, and Godson for the plaintiff.

Brougham, Rotch and Patteson for the defendant.

Brougham moved, in the following Term, for a new trial on another point : but the court refused the rule. The ruling above stated was not called in question.

SITTINGS IN AND AFTER HILARY TERM, IN K. B.

10 Geo. IV.—1829.

WALLIS v. ANDERSON.—p. 291.

An order was obtained for delivery of particulars of set-off within a fortnight : they were not delivered for five weeks, but after the delivery an order was made by consent for the amendment of the declaration.

This is a waiver of the irregularity in the delivery of the particulars.

DEBT for goods sold and delivered : plea, the general issue, with notice of set-off.

On July 2d the plaintiff obtained a judge's order for the delivery of particulars of the defendant's set-off within a fortnight, and that in default thereof no evidence of the set-off should be received at the trial. The particulars were actually delivered on August 9th, and not sooner.

When evidence was tendered in support of the set-off, the plaintiff's counsel objected that it could not be received, under the terms of the judge's order. *Gurney* for the defendant then put in a subsequent order, made on August 12th by consent of the attorneys for each party, for amending the declaration in the action. The amendment was by increasing the sum stated ; and he contended that this order, being obtained by consent, showed a waiver of the irregularity in the delivery of the particulars. Some evidence was proposed to be given on each side to explain the circumstances which occasioned the amendment ; the plaintiff saying that it was not made in consequence of the delivery of the particulars of set-off, the defendant insisting that it was.

Lord TENTERDEN, C. J. I think it better under the circumstances that no such evidence should be given ; for it is not in my opinion material to the decision. I think the obtaining the order of Aug. 12th was a waiver of the irregularity ;

I, as a judge, would not have allowed the amendment if I had understood the delivery of the particulars not to be recognised.

The evidence therefore was received; but the defence finally turned on payment, and the defendant had a verdict.

Sir J. Scarlett and Chitty for the plaintiff.

Gurney and Reader for the defendant.

See *Lovelock v. Cheveley*, Holt, N. P. C. 552.

STEVENS v. LLOYD.—p. 292.

A bill of exchange drawn by A. payable to his own order, and accepted by B. generally, was altered, with the consent of B., while it continued in the hands of A., by the addition of a particular place of payment to the acceptance. This alteration does not vitiate the bill so as to prevent the acceptor from being liable on it.

ASSUMPSIT by the endorsee against the acceptor of a bill of exchange.

The bill was drawn by A. B. on the defendant, payable to his own order: accepted by the defendant generally, and returned by him to A. B., in whose hands it continued for some time. While the bill was in his hands, he with the consent of the defendant, subjoined to the defendant's acceptance words expressing it to be payable at a particular place in London.

F. Kelly, for the defendant, submitted that the plaintiff must be nonsuited. This was a material alteration in the bill, and therefore vitiated it, or at least made it necessary that it should be restamped. Indeed it has been so held since the statute 1 and 2 G. 4, c. 78.(a)

Sir James Scarlett and Chitty for the plaintiff. That was a case where the alteration of the bill was without the knowledge of the acceptor: here the alteration is with his knowledge and concurrence. There is nothing therefore which can possibly prejudice him; and no objection can arise on the stamp laws, for the stamp is not on the acceptance, but on the bill, which remains unaltered.

F. Kelly. The question is not whether the defendant has sustained any injury by the alteration, but whether the document has not been altered in a material part since it was negotiated. It has been so: for it purports to be for value, and if so, it was negotiated when it was returned to the drawer. Besides, the acceptor's liability may be contingently altered; for the drawer might be called on to pay after presentment at the place named in the acceptance, and might thus incur costs, which the defendant, as an acceptor for value, ought to reimburse him.

Lord TENTERDEN, C. J. The drawer's liability might be altered, but not the acceptor's; who, even on the altered acceptance, is liable without the presentment at the particular place. I think the alteration, being made in this case with the defendant's consent, does not furnish any answer to the action. You can move for a new trial, if you please; but I give no leave to move for a nonsuit.

Verdict for the plaintiff.(b)

Sir J. Scarlett and Chitty for the plaintiff.

F. Kelly for the defendant.

(a) *Macintosh v. Hayden*, R. & M. N. P. C. 362.

(b) *Jacob v. Hart*, 6 M. & S. 142.

DANCE v. ROBSON and Others.—p. 294.

Where a court prints and circulates copies of its rules for the guidance of its officers, the production of one of these printed copies is good evidence of the rules which the officers are to act on, though the original rules are kept under the seal of the court, and the copy is not shown to have been examined with the original.

In an action for a libel, which is only libellous on a man in the execution of his office, where the plaintiff has stated, by way of inducement, his due discharge of its duties, the defendant cannot, on the general issue, give evidence of negligence in discharging them in answer to that allegation.

CASE for libel.

The declaration stated that the plaintiff was provisional assignee of the Insolvent Debtors' Court, and that he had always as such officer duly and regularly attended to his duty, and then set out the libel, which consisted of two parts; the one charging the plaintiff with having absented himself from the K. B. prison at a particular time when it was his duty to be there; the other stating that this was not a solitary instance of neglect, but that he had frequently been absent on similar occasions.

The defendant pleaded the general issue to the whole declaration; and to so much of it as related to the first part of the libel he also pleaded, that a rule of the Insolvent Debtors' court made it the plaintiff's duty to attend at the K. B. prison at the time specified, and that he did not so attend, with other matter in support of the charges contained in that part of the libel, which it is not necessary to particularize.

To prove the allegation that there was a rule of the Insolvent Debtors' court, making it the duty of the plaintiff to attend at the K. B. prison on the day in question, the defendants produced a printed copy of the rules and orders of the court. It appeared that these rules were thus printed by order of the court, for distribution among the officers and suitors of the court, and were circulated accordingly: but that the original of them was under the seal of the court, and was kept at the court. There was no evidence that the copy produced had been examined with this original, and *Brougham* for the plaintiff in consequence objected to its admission.

Lord TENTERDEN, C. J., however, admitted it, saying that it was what the court put forth and circulated among their officers as a rule for their guidance; and was therefore evidence of their duties.

In answer to the charge relating to the second part of the libel, Sir *J. Scarlett* for the defendant proposed to give evidence that the plaintiff had in fact failed to attend on several days on which the rule called on him to do so; claiming to be allowed to give this proof, though no justification had been pleaded to that part of the libel, on the ground that the publication was not libellous on the plaintiff, except by reason of his official character; that it therefore was necessary for the plaintiff to state in his declaration, as he had done, the office he held, and his discharge of its duties; and that the evidence was therefore admissible on the general issue to negative the latter necessary allegation.

Lord TENTERDEN, C. J. I think I ought not to receive the evidence. Independently of the particular allegation relied on, I clearly ought not. Part of the alleged libel states the particular negligence complained of not to be a solitary instance; it was competent to the defendants to plead a justification to that part of the libel, and the evidence offered would have gone to support that justification. No such justification, however, is put on the record; and consequently, according to the general rule that evidence is not receivable on the general issue which might be pleaded to part of the libel, the proof tendered is not admissible, unless the particular allegation in question makes it so. I am of opinion that it does not; the allegation might properly have been omitted, and imposes no necessity of proof on the plaintiff: for the presumption of law is that a party does his duty, without evidence given on his part to that effect. The allegation,

therefore, being immaterial, does not alter the general rule as to the reception of evidence; and on that rule, the evidence proposed must be excluded.

The justification failed in proof, and the plaintiff obtained a verdict generally. *Brougham* and *Talfourd* for the plaintiff.

Sir *J. Scarlett* and *Justice* for the defendant.

HILLIARD v. LENARD.—p. 297.

Evidence of a parol promise will not take a case out of the statute of Limitations, in a case tried after Jan. 1, 1829, though at issue before that day.

SIMPSON and Another v. HENDERSON and Another.—p. 300.

On a written agreement for the hire of a vessel to be made ready to take on board "forthwith," evidence is inadmissible to show that the parties agreed that the vessel should be ready in two days. But evidence of the known circumstances of the vessel is admissible to show how soon she might reasonably be expected to be ready.

ASSUMPSIT. The action was brought on a contract of charter of the brig *Kitty*, whereby the defendants agreed with the plaintiffs to take on board *forthwith* such lawful goods, &c., as the plaintiffs, the charterers, should require them. Breach, that the brig was not ready to take on board *forthwith*: with an assignment of special damage in the refusal of the Columbian Mining Company to send a cargo by her, which they would have done had she been ready earlier. There were also counts stating a promise to take on board within two days.

The agreement was produced, dated June 30th, 1828, signed by the plaintiffs and defendants, to take on board *forthwith*. It appeared that the contract signed did not contain any stipulation about repairs; nor was there any in the original offer by the defendants to the plaintiffs. Something, however, was said about the necessity of repairs at the time the contract was entered into; and the defendants, on being informed that the plaintiffs wanted the ship at the earliest possible period, expressed an opinion that she would be complete in two days. At this time it was not exactly known what amount of repairs would be required; but it was certain that she would require to be new coppered. She was not ready at the time: on the 3d of July the plaintiffs gave notice that they required her to be ready on the 4th; and on the 4th, not expecting her to be so, they repudiated their contract to employ her. She was finished on the 5th, and was in the London docks, ready to take in her cargo on the 7th.

There was conflicting evidence on the degree of diligence used to complete her: the witnesses for the plaintiffs stated that she might have been got ready in two days, or, at all events, by the 3d of July; especially if put into a dry dock, instead of being repaired, as she was, on ways: those for the defendant stating that all possible diligence had been used considering the state of the tide, it being impossible to work on ways at high-water, and the time of high-water being such that the men could only work once a-day for a few hours before and after noon.

It was contended on the part of the plaintiff that, independently of this evidence of negligence, the contract was absolute that the vessel should be ready immediately, and that it was broken by her not being so; and that, at all events, she was not made ready in a reasonable time: on the part of the defendant, that the contract was not to be construed so strictly; and that, having been got ready with

the utmost diligence, which they contended to be the result of the evidence, the defendants had done all which could be required of them.

LORD TENTERDEN, C. J. The terms of the contract are, that the vessel shall be ready "forthwith." There is some conversation about her being ready in two days; but this will not affect the construction of the written contract. The question therefore is, whether the words of that contract are complied with, considering the circumstances of the ship, and the situation of the parties? The word "forthwith," indeed, in strictness, means immediately; but it is plain that this cannot be the construction to be affixed to it here. It was known that she required some repairs, at least to be coppered, and some time must be allowed for that. On the other hand, it was known that she was wanted with the utmost expedition. Under these circumstances, the ship not being ready on July 4th, the plaintiffs renounce their contract, and bring this action against the defendants for their default in completing it. The question is, Ought the ship to have been ready on the 4th? if she ought, the plaintiffs were at liberty to reject their contract, as she was not ready. I think therefore that the question is, Whether the vessel could, with reasonable and proper diligence, have been made so? If the jury think on the whole, taking in all the circumstances which rendered the despatch of the repairs more or less difficult, that the vessel could not reasonably have been expected to be ready on July 4th, the defendants will be entitled to a verdict: if she ought to have been ready, the verdict should be for the plaintiffs.

Verdict for the plaintiffs.

Sir James Scarlett and Chitty for the plaintiffs.

F. Pollock and Malkin for defendants.

See inf. *Granger v. Dent*.

EICKE, Gent., one, &c. v. NOKES.—p. 303.

Under the 6 G. 4, c. 16, s. 127, no action can be maintained against a certificated bankrupt for a debt due before his commission, although he has compounded with his creditors before his commission, and his effects have not produced 15s. in the pound under it.

An attorney's clerk is not privileged from answering whether he has received a particular paper from the client.(a)

It is not sufficient evidence of delivery of a signed bill at the defendant's abode, that a signed bill is delivered at a particular place not shown to be his abode, and that he afterwards gives this to his present attorney, who attends the taxation of costs.

The defendant's having signed an admission of the debt to enable the attorney to prove it under a commission of bankrupt then subsisting against him, is no admission of the delivery of a signed bill, and does not dispense with the necessity of such proof in an action subsequently brought against him for the same claim.

An attorney may prove his bill under a commission of bankrupt, without delivering a signed bill.

ASSUMPSIT for work and labour, money paid, &c.

The defendant paid a small sum into court, and pleaded to the rest, *non assumpsit*, and his own bankruptcy and certificate since the cause of action accrued.

The bankruptcy and certificate were proved; but *Williams* for the plaintiff produced a composition deed between the bankrupt and his creditors, executed before the commission; and insisted that, as it did not appear that the bankrupt's estate had produced 15s. in the pound under the commission, his bankruptcy and certificate did not furnish any answer to the present action, although they protected his person from arrest and imprisonment under the 6 G. 4, c. 16, s. 127.

LORD TENTERDEN, C. J. I think the provisions of that section do not prevent the bankruptcy and certificate from being a bar to this action. They protect only the person of the bankrupt, not his future estate and effects: but they vest those latter in the assignees under the commission. It would seem extraordinary

(a) See *Bevan v. Waters*, sup. 515.

that the bankrupt's person should be protected, and the property vested in the assignees, and yet the action be maintainable.

Williams. At all events, if the assignees do not interfere, as between the plaintiff and defendant it is a good answer: just as an uncertificated bankrupt has been held entitled to maintain trover for goods acquired after his bankruptcy, and other similar actions, if the assignees make no claim.^(a)

Lord TENTERDEN, C. J. There is, perhaps, too much doubt on the point for me to decide it here, so as to shut out the defendant from other matter material to his defence. The cause therefore had better proceed.

Part of the claim was on an attorney's bill.

A signed copy had been delivered at a particular place, but no direct proof was given that it was the abode of the defendant. *Williams* however called the clerk of the defendant's attorney to prove that he had received such a copy from the defendant.

Sir *J. Scarlett* objected to his giving evidence of this. He could only have received it as clerk to the defendant's attorney, and if so, the communication was privileged.

Williams answered that the only circumstance respecting which he inquired, was the mere fact of the receipt of a particular paper from the defendant: and Lord TENTERDEN, C. J., admitted the evidence.

Finally, the evidence of delivery amounted only to this. It appeared that a bill had been delivered at a particular place, which was not shown to be the defendant's abode; and, as above stated, that the defendant had delivered it to his attorney's clerk: and it was also shown that the attorney's clerk had attended on the taxation of costs; and the master's allocatur was produced. An admission was also produced, signed by the defendant, to enable the plaintiff to prove the amount under the commission.

The counsel for the plaintiff contended that these circumstances were enough to enable him to recover: the admission being a waiver of the necessity of delivering a signed bill; and the attendance to tax the costs affording a presumption of its due delivery, if that were necessary. And *Curwood* stated that it had recently been held to afford such a presumption, in C. P.

Lord TENTERDEN, C. J. It is a presumption which I am not bold enough to make. Where an act of parliament requires a particular thing, I must see that it is proved. The admission also furnishes no answer to the objection. The plaintiff might prove under the commission without proving the delivery of a signed bill; the defendant signs an admission of the amount, to facilitate his doing so. I cannot consider this either as an admission that such a bill had been delivered, or as a waiver of his right to have such a one before he can be personally charged upon such a claim. Nonsuit.

Williams and *Curwood* for the plaintiff.

Sir *J. Scarlett*, *F. Pollock*, and *Peoly* for the defendant.

A new trial was afterwards moved for, on the ground that the plaintiff's claim was not one requiring the delivery of a signed bill under the statute, and a rule nisi was obtained; but no question was made as to the points stated above.

(a) *Webb v. Fox*, 7 T. R. 391; *Fowler v. Down*, 1 B. & P. 44; *Drayton v. Dale*, 2 B. & C. 293, and the cases cited there.

FELLOWES and Another v. WILLIAMSON.—p. 306.

In case for a false representation of the solvency of A. B., whereby the plaintiffs trusted him with goods; their declarations, at the time, that they trusted him in consequence of the representation, are admissible in evidence for them.

An action commenced before 1st January, 1829, but tried after that day, on such a representation, made by parol before the statute 9 G. 4, c. 14, is maintainable.

CASE for falsely and fraudulently representing to the plaintiffs that one Duffy was in solvent circumstances, and worthy to be trusted.

Application was made, at the end of May 1827, on the part of Duffy, that the plaintiffs should furnish him with a small parcel of goods. The plaintiffs said that, as the amount was small, they had no objection; but that they could not deal with him further without making inquiries as to his character and circumstances; that they had the opportunity of doing so, and would accordingly do it. They immediately applied in consequence to the defendant, and received from him, on June 2d, a favourable representation, on which the action was brought. No application for goods was made by Duffy till the November following; at that time and in January 1828, he ordered goods, which were sent and never paid for; and in April 1828, he compounded with his creditors. The action was commenced before Michaelmas Term, 1828.

Campbell for the plaintiff proposed to give evidence that, when they were applied to in November for goods for Duffy, they stated that they had received a favourable account of him, and would accordingly send them.

Sir *James Scarlett* for the defendant objected to the evidence. The general rule is that a man's declarations are not evidence for himself; and the only exceptions, when declarations accompanying an act are admitted, are in cases where the declarations qualify the act, and are therefore necessary for its explanation. Here the act is unequivocal; Duffy applies for goods, and has them.

Lord TENTERDEN, C. J. I cannot exclude the evidence. The cause turns, as far as this part of it is concerned, merely on the question, Whether the goods were furnished in consequence of the declaration; and what other evidence can there be of that fact? If it were not given, it would probably be urged that the supply of the goods, which were not furnished till five months after the representation, did not take place in consequence of, or in connexion with it; and this, when in fact the representation was expressly referred to at that time. The evidence is perhaps liable to some observation; but I must receive it. I will, however, make a note of the objection.(a)

In the course of his address to the jury, Sir *James Scarlett* observed that some doubt had been entertained whether the action was maintainable on this mere parol representation, with reference to the provisions of the stat. 9 G. 4, c. 14; but that the counsel for the defendant had considered that question, and that the act, looking to the dates, did not apply.

Lord TENTERDEN, C. J. No, certainly: the statute is out of the question.(b)
Verdict for the plaintiffs.

Campbell and *Follett* for the plaintiffs.

Sir *J. Scarlett*, *Reader*, and *R. V. Richards*, for the defendant.

(a) See inf. *Vacher v. Cocks*.

(b) Sup. 526, *Hilliard v. Lenard*.

NELSON and Others v. SALVADOR.—p. 309.

A warranty to sail on or before a particular day, is not fulfilled, if the ship does not completely unmoor on that day, though she then has her cargo and passengers on board, and is quite ready to sail, and is only prevented doing so by stress of weather.

ASSUMPSIT on a policy of insurance on sugars on board the ship *George* at and from Tobago, "warranted to sail on or before the 1st of August, 1827;" the time of sailing being afterwards altered by the substitution of the 10th of August for the 1st.

F. Pollock for the plaintiffs stated to the jury, that the ship was cleared outwards on the 9th of August, that the whole of her cargo and all her passengers were on board on the morning of the 10th, and that on the afternoon of that day she prepared to leave the port. She was then moored by two anchors

One of them was weighed, some of the sails set, and the ship proceeded about thirty fathoms, by heaving in that quantity of the cable of the remaining anchor. When they were about to heave that anchor, the captain observed a very heavy swell setting into the bay, and feared to take his departure lest he should be lost in getting out. Nothing more therefore was done until the morning of the 11th, when the ship actually left the port. She was lost on her way home. The learned counsel said, that the point arising on these circumstances was quite a new one; and the question was, Whether such a warranty meant more than that the ship should be in condition, and ready to sail if the weather permitted? It cannot be required that she should actually sail, to the imminent hazard of the ship and crew; and the underwriters would have had little reason to be satisfied, if she had sailed to fulfil the warranty, and had been lost in getting out of the harbour.

The circumstances opened were then proved.

Sir *J. Scarlett* for the defendant. Does not your lordship think the case is over?

Lord TENTERDEN, C. J. I think so; there is no sailing here. The warranty means that the ship shall be on her voyage on the given day. If the circumstances proved amounted to a compliance with it, the ship might be detained by bad weather for a fortnight or more without unmooring; and in that case the risk might be materially altered. The plaintiff must be nonsuited.

His Lordship then turned to the jury, which was special, and said—"I hope, gentlemen, you agree with me;" and several of them immediately expressed their concurrence. Nonsuit.

F. Pollock and *R. V. Richards* for the plaintiff.

Sir *James Scarlett* and *Maule* for the defendant.

HAYWARD v. KAIN.—p. 311.

A declaration consisted of one special and several general counts. To the special counts there were several special pleas: to the general counts the general issue. The plaintiff entered a *nolle prosequi* on the special count, and joined issue on the others: Held, that he was entitled to recover on the general counts, though the matters proved might have been given in evidence on the special count and the pleas to it.

Articles of agreement provide, that a seaman shall receive for his wages a proportion of the net proceeds of the cargo, after the same are actually received by the owner, subject to certain stipulations as to the seaman's conduct: Semble, that his share may be recovered in an action for money had and received; the owner having received the money, and the seaman having fulfilled the stipulations on his part.

DEBT. The first count of the declaration stated that by certain articles of agreement between the defendant, as the owner of a ship or vessel called the *Sisters*, bound on the South Sea Whale fishery, and the master, officers, and crew of the said ship, of which crew the plaintiff was one, in consideration of the share against each person's name thereunder written of the net and clear proceeds of the cargo of oil, &c., which should be brought home in the said ship, they the said master, officers, and crew, did thereby severally and respectively promise and agree to and with the said owner, well and truly to perform the voyage; and that no one of the said officers and crew should be entitled to his share of the net proceeds until the arrival of the ship at London, and the sale and delivery of the cargo, and the actual receipt of the proceeds by the owner, nor unless he should himself have well and truly performed the voyage according to the true intent and meaning of the said articles. The declaration then averred that a certain share and proportion of the net proceeds of the cargo was set opposite to the plaintiff's name, then and there written under the agreement, to wit, one hundred and fifth share; that the ship set sail on the voyage and arrived in London with a cargo; that the plaintiff served on board on the voyage,

and did well and truly perform the voyage according to the true intent and meaning of the articles; that the cargo was sold and delivered, and the proceeds received by the defendant, and that the plaintiff's share of the net proceeds amounted to a large sum of money, to wit, &c.; which said sum although often demanded, &c., whereby an action, &c. There were common counts for wages, work and labour, &c., and a count for money had and received.

The defendants pleaded the general issue, and a set-off, to the whole declaration: and to the first count, they pleaded several special pleas; one alleging generally that the plaintiff did not well and truly perform the said voyage according to the true meaning of the said articles; and others setting forth particular regulations contained in the articles for the conduct of the crew, and averring breaches of these regulations on the part of the plaintiff.

The plaintiff took issue on the pleas to all the counts of the declaration except the first, and entered a nolle prosequi on that count.

Sir *James Scarlett* for the plaintiff stated his case, which consisted in proof of the performance of the voyage, &c., and also in negating, or explaining and justifying all those specific acts, which were assigned as misconduct in the special pleas to the first count; and he said this would entitle him to a verdict on the count for money had and received. It had been held in two former cases that this count was sufficient, in one of which he himself was counsel for the defendant, and objected to the form of action; but it was held good.^(a)

F. Pollock for the defendants said, that he would not make any objection on that ground. But there was another reason why the plaintiff could not recover on this record. All the matters stated might have been given in evidence on the first count of the declaration, and the pleas to it; and that being the case, the plaintiff, who has abandoned that count, cannot prove the same matters under another.

Comyn. A nolle prosequi is no bar to other proceedings for the same cause of action. 1 Wms. Saund. 207, n. 2.

F. Pollock. Certainly not: it is no bar in another action. But in the same action the plaintiff cannot properly recover on several counts, without proving several distinct causes of action: and in this case therefore, as he admits that he cannot prosecute the first count, he cannot recover on any other, without showing a cause of action distinct from that in the first count; and this he has not done, for all the evidence opened applies to the issues tendered on that count.

Lord TENTERDEN, C. J. I do not feel the weight of the objection.^(b)

Verdict for the plaintiff.

Sir *J. Scarlett* and *Comyn* for the plaintiff.

F. Pollock and *Platt* for the defendants.

^(a) See 1 Camp. 300, *Evans v. Bennett*.

^(b) *Marshall v. Griffin*, R. & M. N. P. C. 41.

REX v. BROWNE.—p. 315.

[S. C. 3 Carr. & P. 572.—14 E. C. L. Reports.]

The *nisi prius* record of a cause, with the minute of the verdict endorsed by the officer of the Court on the jury panel, is good evidence that the cause came on for trial, though no regular *postea* is endorsed.

In an indictment for perjury, the supposed perjury arose upon evidence given in reply to the testimony of one of the defendants on the former trial, who was acquitted, and examined as a witness. The indictment did not state his acquittal, nor did the minute of the verdict produced show it: Held, that this was immaterial, parol evidence being given to show that he was in fact examined.

INDICTMENT for perjury.

The indictment stated the trial of a cause of *Carpenter v. Jones* and others at *nisi prius* before Lord Tenterden at Westminster, that Browne was sworn as a

witness, that it became a material question whether he had had any communication respecting the trial of that cause with Carpenter, the plaintiff in it, and that he had then denied any such communication, on which denial perjury was assigned.

The cause of *Carpenter v. Jones* and others was an action on the case for libel, with pleas of the general issue, and justification; and the plaintiff having failed to give any evidence to connect Stafford, one of the defendants, with the publication, he was acquitted in the progress of the cause, and examined as a witness in support of the pleas of justification. The present defendant was in court at the time, and tendered himself as a witness to state that he would not believe Stafford upon his oath. On his cross-examination he stated himself to be merely accidentally present at the trial, and denied having had any communication with Carpenter on the subject of the trial, in the manner stated in the indictment.

To prove the allegation that the cause came on for trial, the nisi prius record was produced. On its production it appeared that no *postea* had been endorsed upon it: but there was a minute endorsed upon the jury panel, which was affixed to it, in these words: "Verdict for the plaintiff, damages 1s." This minute was in the handwriting of the officer.

Lord TENTERDEN, C. J., intimated a doubt whether this was sufficient evidence. There is a case in *Strange*,^(a) cited in *Phillips on Evidence*, which speaks of the *postea* as good evidence of the trial; but this is different. The mere production of the nisi prius record is clearly insufficient, for that may be made up, and yet the cause never tried: the question therefore is, Whether the minute on the jury panel be sufficient evidence of the trial? In London and Westminster, certainly, it is not the practice for the officer at the trial to endorse the *postea* as it is in the country: but there is another difficulty; if that minute be taken as evidence, it will appear that there was a general verdict against all the defendants, and it seems necessary to the case in support of the prosecution to show that Stafford was acquitted, for the testimony given by the present defendant only arose out of his being examined as a witness.

Sir J. Scarlett for the prosecution. The case in *Strange* only shows that the *postea* is good evidence of the trial, not that no other is sufficient: and the minutes may well be received, for previously to final judgment minutes only are necessary. Here the judgment, or even the verdict, is immaterial; the only circumstance material is the trial of the cause, and the minutes are sufficient to show it. Then, as to the other difficulty, it is nowhere stated in the indictment that Stafford was acquitted, or even that he was examined as a witness: and, if this be necessary, even without acquittal he might be examined as a witness by consent.

Denman for the defendant. The defendant's testimony would only be material in consequence of Stafford's having been examined. He might certainly be so after acquittal, or even without it by consent: but it must be shown that one of these took place: and the evidence produced shows neither.

Lord TENTERDEN, C. J. I am unwilling to stop a cause on an objection of this kind, of which the defendant may have the benefit hereafter. But I will consult the other judges. His lordship then went to the adjoining court, where BAYLEY, LITTLEDALE, and PARKE, Js., were sitting, and on his return said: The learned judges are of opinion that the officer's minute is sufficient evidence that the trial took place. And they incline to think that the defect, that it does not show Stafford's acquittal, may be supplied by parol evidence that he was examined as a witness.

The short-hand writer was then called as a witness. He stated, that Stafford was acquitted and then examined.

Denman. Does your lordship think this any proof of his acquittal?

Lord TENTERDEN, C. J. No: but it is good proof that he was examined.

The cause then proceeded. In the course of it, a fuller minute was produced

(a) *Pitton v. Walter*, 1 Str. 162, cit. 1 Phill. Ev. 390, 5th edit.

from the associate's office, which supplied proof of Stafford's acquittal before the conclusion of the cause: but finally, although several witnesses proved the defendant to have been in company with Carpenter on the evening before the trial, only one stated that the trial was talked of between them, and Lord TENTERDEN, C. J., directed an acquittal.

Sir J. Scarlett, Campbell, and Platt, for the prosecution.

Denman and Patteson for the defendant.

SITTINGS AFTER HILARY TERM, IN C. P.

60 GEO. IV.—1829.

GOODHAY, Assignee of HOUGHTON, a Bankrupt, v. HENDRY.—p. 819.

In an action by the assignees of a bankrupt, the bankrupt is not rendered competent unless his certificate and release are produced, or the non-production of them is accounted for.

ASSUMPSIT for goods sold and delivered.

For the plaintiff, Houghton, the bankrupt, was called as a witness. He stated that he had obtained his certificate, but did not produce it. His release to the assignees was in court.

Wilde, Serjt., for the defendant, objected that he was incompetent, unless the certificate was produced; that the incompetency of the bankrupt appears by the record, and can only be removed by the best evidence, namely the document itself. Where the incompetency is raised on the *voire dire*, it may be removed by secondary evidence; but the admission of such evidence is an anomaly, and does not extend beyond the necessity of the rule. Here the plaintiffs knew of the incompetency, and ought to have come prepared with legal evidence to remove it.

Adams, Serjt., for the defendant, relied on the practice of receiving secondary evidence on the *voire dire*; and said that, at all events, the release was sufficient to remove the interest in this action, which was merely to increase the fund.

Wilde, Serjt., in reply. The sum recovered in this action would go towards the satisfaction of the bankrupt's debts, and therefore he has an interest, unless he is discharged from them by his certificate.

BEST, C. J. I think both release and certificate are necessary to remove the incompetency, and both must be proved by the best evidence. It is not like the case of an objection raised by secondary evidence on the *voire dire*, which may be removed by it. Here he stands disqualified, and his competency must be set up by the best evidence. Nonsuit.

Adams, Serjt., and *Archbold*, for the plaintiff.

Wilde and *Jones*, Serjts., for the defendant.

"If the opposite party raise the objection of interest by independent evidence, and without putting a question to the witness, then the party who has called him cannot be allowed to put a question to him in order to repel the objection." 1 Phill. Ev. 131, 5th ed. "When the objection arises from a witness's answer on the *voire dire*, it may likewise be removed on the *voire dire*." *Ib.* In the principal case the objection not only arose on matter of record which was already in evidence, namely the commission; but it was involved in the very title of the plaintiffs, whose only right to sue accrued through the bankruptcy.

The same point was made in *Wandless*, assignee of *Marten*, v. *Cawthorne*, in the K. B. at Guildhall, Dec. 3, 1829, and the principal case was mentioned by *Thesiger* for the defendant,

and strongly opposed by the *Attorney-General* for the plaintiff, and Parke, J., said he should decidedly overrule the objection. The certificate, was however, produced.

In a case in C. P. at the sittings after Michaelmas term, 1829, the same question arose, and objection was made to the competency of the bankrupt without the production of the release. On the other side it was said that it was always sufficient, when an objection arose on the *voire dire*, to remove it by the testimony of the witness.

TINDAL, C. J. The difficulty in this case is that the objection does not arise on the *voire dire*: it appears from the opening of the case for the plaintiffs, and from the pleadings themselves, that the witness is a bankrupt; not merely from questions put to him when he comes into the box. Without coming to any decision on the question, I think, if you have the release here, you had better produce it.

The release was produced, and the witness examined.

MUTRIE v. HARRIS.—p. 322.

In an action on a promissory note, and also for goods sold and delivered, if the plaintiff prove the delivery of the goods before the note was given, and do not show the consideration of the note to have been distinct from them, the defendant must have a verdict on one of the counts; the plaintiff cannot take a verdict on one, and have the jury discharged from giving a verdict on the other.

ASSUMPSIT by the payee against the maker of a promissory note; with a count for goods sold and delivered.

The action was brought upon the promissory note, and also for goods stated to be independent of the consideration for which the note was given. The note was proved, and also the delivery of the goods; but it appeared that they were delivered, and the time of credit usually given for goods in the particular trade had expired, before the date of the note: and no evidence was given to show what the consideration of the note was.

BEST, C. J., having intimated that he must, on this evidence, take the goods to have been part of the consideration of the note, *Taddy*, Serjt., requested to be allowed to take a verdict on the count upon the promissory note, and to have the jury discharged from giving a verdict on the count for goods sold and delivered.

BEST, C. J. If you had declined in the first instance to proceed in this action for goods sold and delivered, I would have allowed this: but here evidence has actually been given, which would have entitled the plaintiff to a verdict on that count, if the case had stopped there; and other evidence on which I must take it that, if the plaintiff is entitled to recover on the promissory note, he is not entitled to recover for the goods. I think therefore that the defendant is entitled to a verdict on that count.

Verdict for the plaintiff on the count on the bill: for the defendant (a) that for goods sold and delivered.

The cause was undefended.

Taddy, Serjt., and *Alderson*, for the plaintiff.

MAUNDER v. VENN.—p. 323.

In an action by a father for seduction, it is not necessary to show any acts of service done by the daughter: it is enough that she lived in the father's family under such circumstances that he had a right to her services.

THIS was an action to recover compensation for the seduction of the plaintiff's daughter.

The cause was undefended; but in the course of the plaintiff's proof, a difficulty occurred in making out any acts of service of the daughter. It being however proved, that the seduction took place while she was residing with the plaintiff, and forming part of his family,

LITTLEDALE, J., interposed, and said that the proof of any acts of service was unnecessary: it was sufficient that she was living with her father, forming part of his family, and liable to his control and command. The right to the service is sufficient. I remember Lord Alvanley so ruling, and I have always myself been of the same opinion: if it were otherwise, no action could be maintained for this injury by a father in the higher ranks of life, where no actual services by the daughter are usual.

Some acts of service were however subsequently proved, and the plaintiff obtained a verdict for one hundred pounds.(a)

C. F. Williams and Coleridge for the plaintiff.

The cause was undefended.

(a) See *Fores v. Wilson*, Peake's N. P. C. 55; and *Jones v. Brown and Another*, ib. 233. *Bennett v. Alcott*, 2 T. R. 166. *Dean v. Peel*, 5 East, 45, and the cases cited there. *Hall v. Hollander*, 4 B. & C. 660.

EALES v. DICKER.—p. 324.

In an action by the endorsee against the acceptor of a bill of exchange, the bill is not admissible as evidence of money had and received.

THIS was an action by the endorsee against the acceptor of a bill of exchange, with the usual money counts.

The plaintiff was unable to proceed on the counts on the bill, on account of a variance in the mode of statement; and *Follett* for the plaintiff thereupon proposed to give the bill, which was admitted to be the defendant's acceptance, in evidence on the count for money had and received.

LITTLEDALE, J. I am decidedly of opinion that the bill is not evidence of money had and received by the acceptor to the use of the holder. I know that it has been sometimes supposed that it is so; but I think it against principle, and cannot allow it.(a) My opinion is so decided, that I cannot grant leave to move to enter a verdict.

Evidence was then offered of admissions on the bill, as proof of an account stated, but the jury found for the defendant.

Follett for the plaintiff.

Moody for the defendant.

In the following Easter term *Follett* obtained a rule to set aside the verdict as against evidence, which was ultimately made absolute, but no question was made of the ruling of the learned judge at the trial.

(a) 2 Phil. Ev. 29, 31, 5th ed. and cases cit. ib.

There is a good deal of confusion in some of the dicta to be found on the consideration which a bill of exchange imports. On the whole, it seems that it is in the first instance an acknowledgment by the acceptor that he is indebted to the drawer; by the drawer, that he is indebted to the payee (if they are separate parties); and by the payee, and each successive

endorser, that he is indebted to the party to whom he transmits it. On the latter positions there is probably little doubt: but the first has been denied. It is, however, the view taken by Eyre, C. J., in *Gibson v. Minet*, 1 H. B. 602, and seems most consistent with *Priddy v. Henbrey*, 1 B. & C. 674, though in that case the drawer and the payee were the same person; and the Court declined expressing any positive opinion on a case where they were different. Assuming this to be the correct construction, and it is at all events that most favourable to the subsequent holders, the question, whether such a bill can be given by them in evidence on the common counts against the acceptor, will have to be decided on the general principles regulating the assignment of debts. Now it was considered in *Wharton v. Walker*, 4 B. & C. 163, that no debt could be assigned from one party to another, unless the intermediate debt was extinguished. Here that would not be the case: the holder of the bill might discharge the drawer by laches; but if he were not guilty of laches, and the acceptor failed to pay, the drawer would continue liable to him on the original consideration of the bill itself. It would seem to follow, therefore, that there is no assignment to the holder of the original debt due from the acceptor to the drawer, so as to enable the holder to treat that debt as due to him; and consequently, in conformity with the view taken by *Littledale, J.*, in the principal case, that the bill furnishes no evidence of such a debt.

See also *Bentley v. Northouse*, sup. 474.

R. v. WELLS, HUDD, and COLLEDGE.—p. 326.

On an indictment against principal and accessories, the case against the principal was proved by the testimony of an accomplice, who was confirmed as to the accessories, but not as to the principal: the jury were directed to acquit the prisoners.

THE prisoner Wells was indicted for stealing several pairs of shoes, and the other prisoners for receiving them knowing them to have been stolen.

The only witness to prove the felony was an accomplice, and she also proved the case against the receivers. She was confirmed as to the latter, but there was no confirmation whatever as to her testimony against Wells.

It was objected by the counsel for the prisoner Colledge, that the case ought not to go to the jury. They urged that even as to the receivers the confirmation was not sufficient in itself: but if it was, it would still be necessary to confirm the witness as against the principal felon; for if the case failed against her, the receivers would be entitled to an acquittal.

LITLEDALE, J. The confirmation as to the receivers is slight; but as there is no confirmation against the principal felon, I think the case fails altogether. There ought to be confirmation on that point, before the jury can be asked to believe the witness's testimony.

The prisoners were acquitted.

Jeremy for the prosecution.

Erle and *Bere* for the prisoner Colledge.

It is fully established, that a conviction obtained on the unsupported evidence of an accomplice is legal, though it is usual in such cases to advise a jury to acquit. *R. v. Jones*, 2 Camp. 132. And it is not even the practice of judges to advise the acquittal of a prisoner on the ground that there is no evidence to affect him individually except the testimony of an accomplice, if that testimony be supported as against other prisoners tried on the same charge (*Atwood's case*, 2 Leach, C. C. 521, cit. in *R. v. Jones*, 2 Campb. 132. *R. v. Dawber*, 3 Stark. N. P. C. and note ib.), or with respect to other particulars of his story. *R. v. Birkett*, Russ. & Ry. C. O. R. 251. The distinction made between these cases and the principal case seems to be this: that, as in the case of an indictment against principal and accessory the accessory can only be convicted after the guilt of the principal is established, so that, "the jury shall be charged to inquire first of the principal; and if they find him not guilty, then to acquit the accessory, but if they find him guilty, then to inquire of the accessory" (1 Hale, P. C. 624), the proceedings may be considered as really separate; and consequently the principal is to be convicted or acquitted on the same evidence as if he had been indicted alone. If indicted alone, there being no confirmation as against him, the usual course would have been to recommend his acquittal: for the prosecutor would not be allowed to examine the accomplice as to circumstances affecting the receivers only, and therefore foreign to that indictment, for the purpose of confirming him on them, and thus setting up his credibility.

It may however be doubted whether this is not one of the instances in which the law of the country has been subtilized for the protection of individuals and not for the furtherance of justice. The law, by allowing the joinder of the principal and accessory in the same indictment, affords the opportunity to the accomplice, without being stopped for the irrelevance of the matter, to give his whole account, and to receive such confirmation as it admits. The technical difficulty which would prevent him from receiving this confirmation on an indictment

against the principal only being thus removed, it is evident that a jury would feel his credit just as much supported in this case, where he is confirmed against the accessories, as in cases where he is confirmed against other principals, in which it has been determined that there may properly be a conviction: and as the reason assigned for advising juries not to convict on the unsupported testimony of an accomplice, is the infamy of his character, which makes it necessary that he should receive confirmation before he can be safely believed, it seems inconsistent to allow a conviction in one case, and recommend an acquittal in another, when confirmatory evidence of exactly the same weight has been received in each. It is of importance that the general rules of evidence should confine it to matters strictly relevant to the inquiry, although the effect of them may in particular instances be to exclude the proof of some circumstances which would tend to the discovery of truth; but this can furnish no reason for shutting our eyes to the truth when regularly brought before them in one course of proceeding, though the same truth would not have been so in another. It is certainly possible that one thief, indicted alone, might thus escape, while another indicted jointly with accessories might be convicted in a case exactly similar; and there would thus be an inequality of justice: but the inequality would arise from the undue good fortune of the first: and his escape, from deficiency of evidence, seems to furnish no reason for letting off the other, against whom sufficient evidence exists. The fault may be unavoidable; but it is in the escape of one offender, not in the conviction of the other. Indeed, the same argument might be advanced against the established rule that one of several principals may well be convicted on the testimony of an accomplice, supported against others, but not against him: for he might have been indicted alone, and then he would have been acquitted.

R. v. COLLEY and SWEET.—p. 329.

Where a witness remains in court after an order for the witnesses to withdraw, the judge may still allow him to be examined, subject to observation on his conduct in disobeying the order.

THE prisoners were indicted for burglary.

Before the trial commenced, the witnesses on both sides were ordered out of court, on the usual notice that they would not be examined if they remained.

It appeared however that one of the witnesses for the prosecution, who had retired upon hearing the order, was afterwards, during the evidence of the prosecutor, called in to produce a plan of the premises, and instead of again retiring waited in court, and heard some witnesses examined. Upon this witness being called for the prosecution, *Bompas*, Serjt., and *Jardine*, for the prisoners, objected to his being examined, otherwise the order would be nugatory.

Moody for the prosecution urged that it was a mere mistake of the witness; that nothing appeared to show any improper motive, either on his part or that of the prosecutor, for his remaining; and that it would be unjust and mischievous to deprive the Crown or a prisoner of a witness's testimony through the mistake of the witness, or even through his voluntary disobedience of the order; and he said that it had been ruled in a criminal case on the Northern Circuit by Bayley, J., after consulting with Holroyd, J., that a witness might still be examined who had disobeyed the order, subject to all remarks on his testimony which his so doing might furnish.

LITTLEDALE, J., after consulting GASELEE, J., said that it depended on the circumstances of the case whether such a witness ought to be examined, and that he should receive this witness.

The case then proceeded with the other witnesses, and it being found unnecessary to examine the witness, he was not called, and the prisoners were convicted.

Moody for the prosecution.

Bompas, Serjt., and *Jardine*, for the prisoners.

PARSONS v. HANCOCK and Others, Executors and Executrix.—p. 330.

On a plea by several executors that they have fully administered, if some are shown to have assets in their hands, and the others not, the latter are entitled to a verdict.

DEBT. Plea, by all the defendants, that they had fully administered the goods and chattels, &c.

The plaintiff produced, as evidence of assets, an inventory of the goods of the deceased, signed by two or three defendants as executors. The three defendants had proved the will.

R. V. Richards for the defendants submitted that the third defendant who had not signed the inventory, was entitled to a verdict, there being no evidence of assets as against her.

Jervis for the plaintiff. All the defendants proved as executors, and consequently the receipt of any is the receipt of all.

PARKE, J. I think the defendant who did not sign the inventory is entitled to a verdict. The substance of the plea, as far as she is concerned, is, that she administered all that ever came to her hands for that purpose: and there is no evidence that any ever did so. I think the plaintiff can only have his verdict against the two who signed the inventory. Verdict accordingly.

Jervis and Talfourd for the plaintiff.

R. V. Richards for the defendants.

S. P. where the executors pleaded severally by several attorneys. *Bellow v. Jackledan*, 1 Roll. Abr. 929, pl. 5.

See also *Griffiths v. Franklin*, sup. 270; and *Crosse v. Smith*, 7 East, 246.

BATE and Another v. RUSSELL and Others.—p. 332.

In assumpsit, where one defendant pleads a plea operating only in his personal discharge, a verdict may be taken for him on that plea, and he may then be examined as a witness for his co-defendants.

Quære, whether in an action of contract against several defendants, some of whom plead matter negating the action with respect to all, and the other pleads his bankruptcy only, on which the jury find a verdict for him, he is a competent witness, after that verdict returned, to prove the plea of the other defendants.

In an action against partners on a bill of exchange, where the defence is, that one partner, with the knowledge of the plaintiff, accepted the bill in the partnership firm for his private debt; other bills of exchange, accepted by that partner and paid by the other, are not so necessarily connected with the subject of the trial as to render a notice served on the attorney of a defendant, too late for him to procure the bills from the defendant himself, sufficient to let in secondary evidence.

ASSUMPSIT by the payees against the makers of a promissory note.

Pleas, by two of the defendants, Russell and Webb, first, the general issue; secondly, that the third defendant, Bennett, was indebted to Pardoe and Co., who were his bankers, and held his title deeds as security for his advances; that the plaintiffs were also bankers, and wished Bennett's account, with the securities, transferred from Pardoe and Co. to them; that it was necessary for this purpose that the balance due to Pardoe and Co. should be paid; and that it was agreed, before the note was given, that the plaintiffs should advance the money for that purpose, and that Bennett and Russell and Webb, as his sureties, should make the note in question, and that, on delivery of the title deeds to the plaintiffs, the note should be void. The plea then averred that the note was made on this consideration, and no other; and that the title deeds were afterwards delivered to the plaintiffs.

The other defendant, Bennett, pleaded his bankruptcy and certificate.

Campbell for the defendants put in the certificate of Bennett, and proposed that a verdict should at once be taken for him, and that he should then be ex-

mined as a witness for the other defendants in support of their special plea. It is in the discretion of the Court at any time to permit this; and the Court will do so, when it appears that the evidence to be given in behalf of the remaining defendants cannot implicate the defendant for whom the verdict is to be taken. In a recent case^(a) Lord Tenterden acted on this principle; and it applies here, for the bankruptcy and certificate completely discharge the witness, whatever be the result of the action. If a *nolle prosequi* had been entered, he would have been competent; and he ought to be equally so now, for he is equally discharged from all liability.

Russell, Serjt. In that case, he would no longer be a defendant on the record. There is no instance in which, in an action on a contract, the practice, which has certainly been allowed in actions of tort, of allowing a verdict to be taken in favour of one defendant before the cause is at an end, has been adopted. And it is unreasonable that it should be. It is clear that if the defendant Bennett had pleaded the general issue, as well as his bankruptcy, he would not have been admitted as a witness; and the more convenient course is to adopt the same rule in all cases. Besides, the question has been expressly decided against his admissibility, in *Raven v. Dunning*, 3 Esp. N. P. C. 25; in *Currie v. Child*, 3 Campb. 283; and in *Emmett v. Butler*, 7 Taun. 559; S. C. nom. *Emmett v. Bradley*, 1 Moore, 332, in which case the matter was very fully discussed, especially by Gibbs, C. J., and the witness was excluded.

PARKE, J. Those cases are no longer authorities directly in point; for the state of the bankrupt law with reference to the costs in such a case is not now exactly what it was. I will give no opinion however with respect to the operation of the law as it now stands on the competency of the witness; but I will direct the jury to find a verdict for Bennett on his plea of bankruptcy, and then receive his evidence: giving the plaintiffs leave to move to enter a verdict, if the Court shall think the evidence inadmissible.^(b)

The verdict was accordingly taken, and the witness examined, receiving a release from the other defendants. No opinion was expressed as to the necessity or operation of this release: but it was given *ex majore cautela*.

Verdict for the plaintiffs.

Russell, Serjt., and *Holroyd*, for the plaintiffs.

Campbell and *Alexander* for the defendants.

A rule nisi for a new trial was obtained on affidavit, and on payment of costs, in Easter term, but no notice was taken of the points ruled at *Nisi Prius*.

(a) *Carpenter v. Jones*, sup. 507, n.; stated also in *R. v. Browne*, sup. 531.

(b) In a case of *Affalo v. Fourdrinier*, tried in C. P. at the sittings after Trinity term 1829, in London, a similar question arose. That was an action brought by the endorsee of a bill of exchange against Fourdrinier and Almosninos as the acceptors. Fourdrinier pleaded the general issue: Almosninos pleaded his bankruptcy only, and there was a *nolle prosequi* entered as to him. Fourdrinier and Almosninos were in partnership, and the bill was accepted by Almosninos in the partnership firm. The defence was, that Almosninos had accepted it in the partnership firm in satisfaction of a claim upon himself only; and that the plaintiff was cognisant of these facts. Almosninos was tendered as a witness to prove this; and was objected to on the part of the plaintiff, on the ground of interest.

TINDAL, C. J., thought it most convenient to receive the evidence of Almosninos, who had released his surplus, and to reserve the question for the opinion of the Court: and upon argument in banc, the witness was held to be competent, 6 Bing. 306.

In the same case, the plaintiff had given notice to produce other bills of exchange accepted by Almosninos in the partnership firm, and paid by Fourdrinier. The bills were not in the possession of the defendant's attorney on the record, who was the London agent of his attorney in Staffordshire; and the defendant living in Staffordshire, and the notice to produce being served only on the day next but one before the trial, there was no time to get them from the country.

TINDAL, C. J. This notice is insufficient to let in parol evidence: there must be at least a possibility of getting the instruments in consequence of the notice. If indeed the instruments were so necessarily connected with the transaction in question, as to make it a natural conclusion that they would be in the possession of the attorney, the notice might be sufficient; but that is not the case here. The defence turns on specific facts connected with the particular

bill; and the defendant's attorney would not be led to conclude, that the plaintiff would war: to go into all the general transactions of the partnership.(a) Verdict for the defendant.

Spankie, Serjt., and Tomlinson, for the plaintiffs.

Wilde and Russell, Serjts., for the defendants.

(a) See *Vice v. Lady Anson*, 14 E. C. L. R.

MELEN v. ANDREWS and Another.—p. 336.

The deposition of a witness, taken in a judicial proceeding, in the presence of the party there charged, is not admissible in another proceeding against that party on the ground that he was present, and had the opportunity of cross-examining.

CASE for maliciously laying an information against the plaintiff before two magistrates, under the stat. 7 & 8 G. 4, c. 30.

After the information, and the deposition of the defendant Andrews, had been read, and it had been shown on cross-examination that Melen had cross-examined Andrews, and had commented on his evidence, *Campbell* for the defendants proposed to inquire of the same witness, what *Chocketts*, another party examined on the same occasion, but not a party to this record, had stated; claiming to be entitled to do so, on the ground that it was said in Melen's presence, who had the opportunity of cross-examining the witness, and observing on his testimony: a privilege which he used with reference to Andrews. The evidence is therefore admissible on the common principle, as showing his conduct when particular statements were made in his presence.

PARKE, J. I think it is safer to refuse it, and to hold that the deposition of a witness, taken in a judicial proceeding, is not evidence on the ground that the party against whom it is sought to be read was present, and had the opportunity of cross-examining. It clearly would not be admissible against a third person, who merely happened to be present, and who, being a stranger to the matter under investigation, had not the right of interfering; and I think the same rule must apply here. It is true that the plaintiff might have cross-examined, or commented on the testimony; but still, in an investigation of this nature, there is a regularity of proceeding adopted which prevents the party from interposing when and how he pleases, as he would in a common conversation. The same inferences therefore cannot be drawn from his silence, or his conduct in this case, which generally may in that of a conversation in his presence; and as it is only for the sake of these inferences that the conversation can ever be admitted, I think it is better to refuse the evidence now offered.

The plaintiff was afterwards nonsuited.

Ludlow, Serjt., and Curwood, for the plaintiff.

Campbell and Russell, Serjt., for the defendants.

See *R. v. Appleby*, 3 Stark. N. P. C. 33. *Finden v. Westlake*, *infra*.

NEWMAN, Assignee of EARLE, v. STRETCH.—p. 338.

The declaration of a bankrupt on his return, that he had absented himself to avoid a writ against him, is sufficient evidence of an act of bankruptcy, without any other proof of the existence of the writ, or of the debt on which it was founded, or of creditors of the bankrupt.

JEBB and Others v. M'KIERNAN and Another.—p. 340.

A bond, conditioned for the due discharge by A. M. of the duties of clerk, provided that such discharge should be ascertained by the inspection of A. M.'s accounts by J. S.; and that the amount so ascertained should be liquidated damages. A paper by which J. S. has ascertained such amount, requires to be stamped as an award.

REX v. HODGES.—p. 341.

In 7 & 8 G. 4, c. 29, s. 38, the words "adjoining any dwelling-house," import actual contact; and, therefore, ground separated from a house by a narrow walk, and paling with a gate in it, is not within their meaning.

Whether ground be properly described as a "garden," within the same section, is a question for the jury.

The words "plant," and "vegetable production," in s. 42, do not apply to young fruit-trees.

DAVIES v. DAVIES, Administratrix, &c.—p. 345.

On a plea of plene administravit to an action against an administratrix, an unsatisfied creditor of the intestate is a competent witness for the defendant.

ASSUMPSIT for the use and occupation of a colliery.

Pleas, non assumpsit, set-off, and plene administravit.

The defendant, to prove payments in support of the plea plene administravit, produced a witness who was himself an unsatisfied creditor.

Russell, Serjt., objected to his competency, as coming to increase the fund out of which he was himself to be paid.

PARKE, J. It was considered in *Carter v. Pearce*, 1 T. R. 164, that a creditor of an administrator was a competent witness for him.^(a) There is a dictum of Lord Ellenborough (in *Craig v. Cundell*, 1 Campb. 381) to the contrary, but I could never understand the principle on which it proceeded. If the intestate were alive, a creditor of his would be a competent witness for him, and I see no reason for distinguishing between the cases. I shall therefore admit his evidence.

Verdict for the defendant on all the pleas.

Russell, Serjt., and *Cross*, for the plaintiff.

Campbell, *Maule*, and *Blewitt*, for the defendant.

(a) See also *Paull v. Brown*, 6 Esp. 34.

SITTINGS AFTER EASTER TERM, IN K. B.

10 GEO. IV.—1829.

WHITE v. LEROUX.—p. 347.

An action for money paid to the use of the defendant may be maintained by a sheriff's officer who has paid the debt and costs on attachment against the sheriff, bail above not having been put in through the misconduct of the defendant in imposing insufficient bail on the sheriff, and the defendant not having promised to indemnify the officer both before, and after the payment: but the officer cannot recover beyond the debt.

ASSUMPSIT for money paid to the use of the defendant, and the common counts.

This action was brought to recover a sum of money paid by the plaintiff under the following circumstances. The plaintiff was a sheriff's officer, and had been employed under a warrant from the sheriff to arrest the defendant on a writ of latitat at the suit of one Newton. The defendant, on being arrested, prevailed on the plaintiff to take a bail-bond from himself and two sureties, one of whom was the defendant's son. The writ was returnable on the 28th of November, and the defendant executed the bond on the 27th; but the sureties did not execute until after the return of the writ. The son of the defendant was also under age; a fact which was not made known to the plaintiff. Bail above were not put in, and an attachment was obtained against the sheriff, and the plaintiff paid 10*l.* 1*s.* 2*d.* for the debt and costs. The sheriff sued the defendant and the sureties, in a joint action on the bail-bond; and they appeared and pleaded, first, that the son was under age, secondly, that the two sureties did not execute until after the return of the writ, and ease and favour generally; whereupon the sheriff discontinued, and paid the costs.

The defendant had repeatedly promised to indemnify the plaintiff, and repay him the money expended; and this, both before and after the sheriff was fixed, and the money paid, and with a knowledge of the facts; and had authorized steps to be taken with a view to raise the money, and repay him.

Chitty contended that to the extent of the debt, at all events, this was money paid to the defendant's use.

Gurney and Campbell, contra. There is no special count; and the only common count which can possibly apply is that for money paid to the use of the defendant. Now, at the time this money was paid the defendant was not at all liable. The whole sum was paid by the sheriff, for his own benefit, in discharge of an attachment; the defendant was in no respect liable, under that attachment, to pay any part of the money; and they cited *Pitcher v. Bailey*, 8 East, 171.

Lord TENTERDEN, C. J. I should have thought so, but for the promises of the defendant. The defendant is released from the demand of the debt against him, by the payment of the sheriff: although this was not done under process against the defendant, I think, to the extent of the debt, it is money paid to his use.

Verdict for the plaintiff, 82*l.* 12*s.* 4*d.*, the amount of the debt.

Chitty for the plaintiff.

Gurney and Campbell for the defendant.

VACHER and Another, Assignees of WINDOW, v. COCKS and Others.— p. 358.

In an action to recover money paid by a bankrupt in contemplation of bankruptcy, on the ground of fraudulent preference, declarations of the bankrupt as to the state of his affairs, made about the time of the transaction, but unconnected with it, are receivable in evidence. So also are letters received by him refusing to advance him money, for the purpose of showing the fact of such refusal, not as evidence of other facts stated in them.

ASSUMPSIT for money had and received to the use of the bankrupt before his bankruptcy, and of the plaintiffs, as his assignees, after it.

The action was brought to recover sums of money, paid by the bankrupt to the defendants shortly before his bankruptcy, on the ground that these payments were made in fraudulent preference of the defendants, and in contemplation of bankruptcy.

The facts, that Window was insolvent at the time of making these payments, and that he stopped payment a few days afterwards, were distinctly proved by other evidence; and it was then proposed on the part of the plaintiffs to give evidence of declarations made by Window about that time, but not accompanying any act, as to the state of his circumstances.

The *Attorney-General* for the defendants objected to the reception of the evidence. In all cases when such evidence has been received, it has accompanied, and been connected with, the transactions in dispute.

Wilde, Serjt., for the plaintiffs. The insolvency of Window at the time of his making these payments is already in evidence; but it is necessary that I should go further, and prove that he was aware of that insolvency. How can that be proved except by showing what he said on the subject? The object of the evidence is not to set up this payment as an act of bankruptcy; but it is admissible as showing under what circumstances, and with what opinion, the payment was made.

Lord TENTERDEN, C. J. I will make a note of the objection; but I think that I must receive this evidence of the bankrupt's own opinion and knowledge of the state of his affairs, as showing his intention in the act called in question.

It was afterwards proved that the bankrupt, about the same time, had applied to one Ikin for pecuniary assistance, and had received letters from him in answer.

Wilde, Serjt., proposed to read these letters on the same ground, that Window's knowledge of the state of his affairs was material, and that it consequently became important to know what communications had been made to him. The letters therefore which state the terms on which the advance was to be made, or the grounds of the refusal, are admissible.

Lord TENTERDEN, C. J. The letters in question cannot be received as evidence of any facts stated in them. If they contain a refusal to give the assistance required, to that extent, and to that extent, only, they are evidence.

Nonsuit.

A rule was afterwards granted to set aside the nonsuit, which proceeded on the merits.

Wilde, Serjt., *F. Pollock*, and *Chitty*, for the plaintiffs.

Scarlett, A. G., *Campbell*, and *Pennington*, for the defendants.

See *Harman v. Fisher*, 1 Cowp. 117; *Guthrie v. Crossley*, 2 Carr. & P. 301. See also sup. 528, *Fellowes v. Williamson*, as to the admissibility of the declaration; and sup. 520, *Cotton v. James*, as to that of the letters. The same point was ruled by Tindal, C. J., in the case of *Herbert*, assignee of *Knight*, an insolvent, *v. Wilcocks*, at the Bristol summer assizes, 1829, which was an action to recover back money paid as a fraudulent preference; and his lordship, after objection, received the declarations of the insolvent, to show the circumstances and condition he was in at the time of the payment.

A rule for a new trial was moved for by *Wentworth*, Serjt., in the Common Pleas, on other grounds, but no objection made on this head.

SITTINGS AFTER TRINITY TERM, IN K. B.

10 GEO. IV.—1829.

BRIANT *v.* EICKE, Gent., One, &c.—p. 859.

Where a judgment is stated in the record as of one court, and it appears by the production of an examined copy to have been obtained in another, the Judge at nisi prius may order the record to be amended, under the 9 G. 4. c. 14.

DEANE v. THOMAS.—p. 361.

In an action for crim. con. at the suit of a Quaker, proof of a marriage according to the forms of that society is sufficient to sustain the action.

THIS was an action for criminal conversation with the plaintiff's wife.

The plaintiff and his wife were both Quakers; and the marriage had been performed according to the ceremonies of the sect, by a public declaration of the parties, at a monthly meeting of the Society, of their becoming man and wife, and a certificate to that effect entered in a register, signed by the parties and by several subscribing witnesses. The register was produced and proved by one of the witnesses, and a member of the Society proved the forms observed to be those usually considered as necessary to marriage amongst Quakers.

The proof was received without objection, and the plaintiff obtained a verdict and damages.

Scarlett, A. G., and Bruce, for the plaintiff.

Brougham for the defendant.

See Roper's Law of Husband and Wife, edited by Mr. Jacob, vol. 2, p. 462, et seq., where the history and validity of Quaker marriages is ably traced and discussed in a note by the editor. It seems that the present is the first case in which such a marriage has been judicially allowed since the case of *Morris v. Miller*, 4 Burr. 2057, established that proof of an actual marriage is necessary to sustain the action.

WALTERS and Others v. PFEIL.—p. 362.

The title of three, claiming as executors, is well evidenced by the probate granted to one only, of the will appointing them all.

In an action for an injury to the plaintiff's premises, in consequence of the pulling down of the defendant's house adjoining, the plaintiff may recover damages for any injury actually caused by the negligence of the defendant, although he has not himself used those precautions which it was his duty to adopt against such injury.

CASE, for an injury alleged to be done to the reversionary interest of the plaintiffs in some houses, by the negligent manner in which the defendant pulled down a house of his own adjoining them.

The plaintiffs were entitled to the property, which was leasehold, as executors of one J. S. To prove their title they produced the probate of the will of J. S., which was granted to one of them only, liberty being reserved to make the like grant to the two other executors.

The *Attorney-General* for the defendants. This evidence is insufficient. Executors may indeed do many things pertaining to their office before obtaining probate: they may be impleaded as executors, and they may deal with the property of the testator; but there is one thing which they cannot do, and that is, the bringing of an action: for in an action by them, the probate is the only proof of their title. Till they obtain probate, therefore, they can bring no action: and here two of them have never applied it.

Brougham for the plaintiffs. Executors derive their title from the will, and differ in that respect from administrators. They cannot indeed prove their title except through the probate, because the probate is the only admissible evidence of the validity of a will of personal property: but when the validity of the will is established the will makes them executors. In this case, probate is granted to one of the plaintiffs: that shows the will to be good; and looking to its contents, it makes the three plaintiffs executors.

The *Attorney-General*. The plaintiffs here claim merely as executors, and they can do so only by having obtained probate. This principle was established in *Wankford v. Wankford*, 1 Salk. 299.

Lord TENTERDEN, C. J. (reading out of Selwyn's *Nisi Prius*). It is a gene-

ral rule that, if there are two or more executors, and one proves the will, they must all join in bringing actions: and if they do not, the defendant may plead in abatement, that there are other executors living not named. In this plea it is not necessary to aver that the executors not named have administered; because they may administer at their pleasure. And this rule, viz. that all the executors shall join, holds even where some of them refuse before the ordinary; because the refusing executors may come in at any time, and administer, notwithstanding their refusal, either during the lives of their co-executors who have proved or after their death." (a)

Campbell. The cases referred to in that passage are of actions brought by the executors, in their representative capacity: in the present case they must show themselves entitled to the property.

Lord TENTERDEN, C. J. So they do: the will entitles them. The only reason for their being all obliged to join in any case, is because they all have the property. (b)

The evidence in the case proved that the plaintiffs, or their tenants, had neglected to take any precautions, by shoring up their houses within, or in any other way, against the effect of pulling down the defendant's house adjoining; and it appeared that this might have been so done, that this accident would not have happened. There was also evidence to show that the accident was owing to the bad foundations of the houses of the plaintiffs; and that all due care was taken by the defendant's workmen, in pulling down his house, to secure those adjoining. On this part of the case however there was contradictory evidence; some witnesses saying that no precautions were taken by them, but that, on the contrary, the demolition was carried on in the manner most injurious to the adjoining houses, and that this was the cause of the injury.

Lord TENTERDEN, C. J., in summing up, said, It is now settled that the owner of premises adjoining those pulled down must shore up his own in the inside, and do everything proper to be done upon them for their preservation. That has not been done here; and it seems that if it had been, it would have given security. Still the omission does not necessarily defeat the action; if the pulling down be irregularly and improperly done, and the injury is produced thereby, the person so acting may be liable for it, although the owner of the house destroyed may not have done all that he ought for his own protection. If therefore you think that the house of the defendant was pulled down in a wasteful, negligent, and improvident manner, so as to occasion greater risk to the plaintiffs than in the ordinary course of doing the work they would have incurred, then I think the defendant liable to make compensation for the consequences of his want of caution: if you think that fair and proper caution was exercised, then the defendant will be entitled to a verdict.

Verdict for the defendant.

Brougham, F. Pollock, and F. Kelly, for the plaintiffs.

Scarlett, A. G., Campbell, and Comyn, for the defendant.

(a) Page 784, 6th edit.

(b) See *Pinney v. Pinney*, 8 P. & C. 335.

See *Bradley v. Waterhouse*, 14 E. C. L. R. 326; *Vanderplank v. Miller*, sup. 498; *Whitmore v. Wilks*, 14 E. C. L. R. 349; in all which cases it was considered that, although the defendant had not been without fault, yet the plaintiffs, having themselves been in fault also, were not entitled to recover. Other instances of the same principle may be found in *Blyth v. Topham*, Cro. Jac. 158; *Brock v. Copeland*, 1 Esp. 203; and especially in the judgments of Dallas, J., and Gibbs, C. J., in *Deane v. Clayton*, 7 Taunt. 489. There is, at first sight, some apparent inconsistency between those cases and the principle adopted by Lord Tenterden in the principal case; but this seems reconcilable on a little consideration. In all the cases referred to, the injury complained of would have had no existence whatever had it not been for the conduct of the plaintiff. In *Bradley v. Waterhouse*, the jury found that the parcel was chosen for depredation in consequence of the partial disguise adopted by the plaintiff: in *Vanderplank v. Miller*, no collision at all would have taken place if the plaintiff's vessel had been properly managed: in *Whitmore v. Wilks*, the clerk would never have received the sums in question, unless the trustees had improperly given him the authorities which he abused: and in the other cases, the injuries complained of could never have occurred at all, except in consequence of the presence of the person or animal injured where he ought not to be. In all those cases, therefore, the plaintiff, although

his injury might be aggravated by the misconduct of the defendants, or although in some instances, as in *Vanderplank v. Miller*, that misconduct was also necessary to occasion it, would have received no damage if he had not himself been guilty of misconduct. In the present instance, on the contrary, it might well be that the conduct of the defendant was such, that no care on the part of the plaintiff, or at least not that ordinary care which alone the defendant could require from him, would have secured him from some injury, though the amount of the injury was mainly owing to his own misconduct. He would therefore be entitled to some compensation; though the exact principle on which its amount ought to be assessed may admit of some doubt. In the principal case, though there was a question of fact for the jury, the evidence pointed very strongly to the conclusion that the injury was entirely attributable to the fault of the plaintiffs: and Lord Tenterden, who summed up strongly in favour of the defendants on that ground, appeared not to find it necessary to give any directions to the jury as to the principle on which they should estimate the damages, if they found a verdict for the plaintiffs.

FLINN, Assignee of KRUM, an Insolvent Debtor, v. TOBIN.—p. 367.

It is no defence to an action on a policy of insurance, that a misrepresentation was made of the cargo with which the ship was to sail on a future day, although, in fact, that representation induced the defendant to sign the policy, unless the misrepresentation was fraudulently made.

ASSUMPSIT on a policy of insurance on the ship *Andromache*.

The defence arose on an alleged misrepresentation. It was stated on the part of the defendant, that the first underwriter on the policy, on being asked to effect an insurance on the ship, had inquired what cargo she was to take, and on being told that she was to have a cargo of rock salt, had refused to insure her, considering that a very dangerous and laborious cargo for a vessel of her quality: that the broker had then gone away to make further inquiries, and returned, stating that she would only take fifty or sixty tons of rock salt, which would put her in light ballast trim: and that the underwriter had then consented to insure her. The precise date of this representation was not fixed, though some evidence was given with a view to show that it was made on the day on which the policy was signed. The ship sailed the day after the policy was signed, with a cargo of 160 tons of rock salt, being a full and very heavy cargo; and was lost. It appeared in evidence on the part of the plaintiff, that the freighters of the ship had required a certificate from a ship-builder that she was fit to carry such a cargo as that shipped on board her, and had received a certificate that she was "fit to carry a cargo of rock salt;" and that this certificate was given several days before she sailed: and some evidence was given, tending to show that it was communicated to the first underwriter before he signed the policy, and that no other representation was made as to the cargo.

The *Attorney-General* for the plaintiff, besides contending that, on the evidence, the representation relied on by the defendant had never been made, argued that, assuming it to have been so, it was immaterial. The misrepresentation of facts which have already occurred often furnishes a defence; but a statement with respect to facts which are hereafter to happen is properly matter of contract and stipulation; and if so, it must be inserted as such in the policy, if the underwriter is to rely upon it. Thus, suppose the case of an insurance on a ship from China, and that a statement is made that she is expected to sail by the 1st of August, or to touch at the Cape; if she does not sail till the 2d, or does not touch at the Cape, it is no answer to an action on the policy. If the underwriter wishes to insist on these circumstances, he must have a warranty that the ship shall sail by August 1st inserted in the policy, or have the voyage described as a voyage via the Cape: and then, and not otherwise, the departure from these conditions will discharge him from his responsibility.

Brougham for the defendant contended that there was a material misrepresentation in this case. It is by no means clear, even if the distinction taken between the representation of a past and a future event can be supported, that

this did not come under the former class ; for if the representation were made on the day before the ship sailed, her cargo was probably all on board at the time, and so the representation would be of her then existing load. But the defendant's right to avail himself of this defence does not depend on any such refined construction. The principle on which misrepresentation excuses him is this, that he ought not to be held to the performance of a contract into which, had he known the true circumstances of the case, he would not have entered. In this case he would not have done so ; for the first underwriter did in fact refuse to insure, until he was told that the cargo of rock salt would not exceed fifty or sixty tons. It is no answer to this to say that he saw a certificate of the fitness to carry a full cargo, even if he did see it : he had the right to exercise his own judgment ; and the inducement to him to insure might have been the expectation that she was going with a light cargo, although declared fit for a full one.

Lord TENTERDEN, C. J., in summing up, said ; I think the defendant in this case will not be entitled to a verdict, unless he satisfy the jury that there was a fraudulent misrepresentation of the cargo which the *Andromache* was to carry. If he does so, the plaintiff cannot recover : but the mere fact of a misrepresentation, without fraud, will not be enough to prevent the plaintiff's recovering ; for the *contract* between the parties is the policy, which is in writing, and cannot be varied by parol. No defence therefore which turns on showing that the contract was different from that contained in the policy, can be admitted : and this is the effect of any defence turning on the mere fact of misrepresentation, without fraud. If however fraud was practised to induce the defendant, or the first underwriter, to sign the policy, no signatures so obtained can be binding. The question therefore is, whether you think there was any wilful and fraudulent misrepresentation made, for the purpose of getting the policy signed : if you are of that opinion, you will find for the defendant ; if not, for the plaintiff.

Verdict for the plaintiff.

Scarlett, A. G., and Alderson, for the plaintiff.

Brougham and Patteson for the defendant.

ABELL and Others, Assignees of DANIELL, a Bankrupt, v. DANIELL.—
p. 370.

Where a bankrupt in the habit of supplying his son with money to pay his bills, gave him 200*l.* for that purpose just before he stopped payment, being at the time insolvent, but not expecting to become bankrupt: Held, that the question for the jury in an action by his assignees against the son to recover that money is, whether it was given in the ordinary course of maintaining the son, or as a fraudulent preference of the son over the creditors, made in contemplation of insolvency. Such gift of money is not within the 6 G. 4, c. 16, s. 73.

BROWN v. CAPEL and Another.—p. 374.

The stat. 47 G. 3, sess. 2, c. 68, s. 29, provides, that all contracts for the sale of coals at the London coal market shall be signed by the buyer and the factor ; that the factor shall deliver a copy of the contract to the clerk of the market ; and that the clerk shall enter it in a book. The 32d section makes such entries "evidence in all cases, suits, and actions touching anything done in pursuance of this act." Held, that the production of such an entry of a contract, purporting to be signed by the buyer and factor, is not evidence of the sale, in an action brought for the price of coals, unless the buyer be proved aliunde to have signed the contract.

SITTINGS AFTER TRINITY TERM, IN C. P.

10 GEO. IV.—1829.

GORE and Another, Assignees of HALLIDAY, a Bankrupt, v WYNNE—
p. 393.

The statute 6 G. 1, c. 18, s. 12, did not extend to prevent partners from lending money or respondentia.

COUTTS v. GORHAM.—p. 396.

A., the owner of two adjoining houses, grants a lease of one of them to B. He afterwards leases the other to C., there then existing in it certain windows. After this B. accepts a new lease of his house from A.: Held, that B. cannot alter his tenement so as to obstruct windows existing in C.'s house at the time of C.'s lease from A., though the windows are not twenty years old at the time of the alteration.

CASE for obstructing lights.

Hall was the owner of two adjoining houses, each of which had certain ancient windows. In 1800 he made a lease of one of them to Barnes for twenty-one years determinable on lives; which lease Barnes, in 1808, assigned to Gorham. In November 1809 Gorham took a new lease of the same premises for twenty-one years from Hall.

The windows of the other house had been altered, and placed in a situation different from the ancient ones, at a period which was not distinctly proved; but it rather appeared to be within twenty years of the time at which the alterations complained of in this action were made. On May 1, 1809, Hall made a lease of that house to Coutts, and the windows had been altered before this time: there was indeed contradictory evidence on that point, but the jury found that they had been so. The action was brought for the obstruction of the light from these altered windows by recent alterations of the defendant's premises.

Wilde, Serjt., for the defendant. The plaintiff cannot recover in this action. The windows were not twenty years old, and consequently not entitled to the protection of ancient lights. Nor does the circumstance of their existing at the time of the leases to Coutts and Gorham, even assuming that they did so, give any right of action. At the time of the lease to Coutts there was an existing term in the other premises in Gorham, and the landlord could not bind him. Although Hall therefore might not be at liberty to obstruct Coutts's new windows, after having granted him a lease of the premises in which they existed, Gorham had a right to do so; and if so, as he continued to hold under a lease made during the continuance of that term, and in substitution for it, he would continue to have the same right.

TINDAL, C. J. If the windows were in existence at the time of the lease to Coutts, he is entitled to a verdict. Hall, who executed that lease when the windows were there, could not himself obstruct them afterwards; and if so, he could not convey to any other person a right to do so. It is true that Gorham had an existing term at the time, and his interests in that term would not be affected by Hall's lease to Coutts; but he surrendered that term by operation of law, when he accepted a new lease from Hall. That new lease was derived out of Hall's reversion, and Hall's reversion was subject to the rights already granted by him to Coutts. Assuming then that the windows were made within twenty years, but before the lease to Coutts, Gorham's present interest is derived from the same lessor at a subsequent period, and is therefore subject to the rights

which Coutts already had against his lessor, and consequently to that of his having the windows in question free from any obstruction.

Verdict for the plaintiff.

Taddy, Serjt., and *Talfourd* for the plaintiff.

Wilde, Serjt., and *Wyborn* for the defendant.

In the following term *Wilde*, Serjt., obtained a rule nisi for a new trial, on the ground that the verdict was against evidence as to the question whether the windows had been altered before the lease to Coutts; but he admitted that he could not except to the law as laid down, if they had been so.

See *Riviere v. Bower*, R. & M. N. P. C. 24; *Compton v. Richards*, 1 Price, 27; *Palmer v. Fletcher*, 1 Lev. 122.

COOMBS v. COETHER and WHEELER.—p. 398.

A book kept in the chapter-house of the dean and chapter of Sarum, purporting to contain copies of leases granted by the dean and chapter, is, as a public book, evidence of those leases for the purpose of reputation, without proof of possession under the leases.

PROHIBITION. The issues on the part of the defendant were, that the district of Milford, for the time whereof the memory of man runneth not to the contrary, was and is part and parcel of the parish of St. Martin, in the county of Wilts, in the diocese of Sarum; and, secondly, that the plaintiff was and is an inhabitant of the said parish of St. Martin in the said county and diocese.

A book was produced from the chapter house of the dean and chapter of Sarum, kept by the chapter clerk, entitled Leases, and purporting to contain copies of leases granted by the dean and chapter, and their confirmations of leases granted by the bishop or the prebendaries. The witness stated that it was the practice to allow the tenants of the manors to have access to this book, and take copies of the leases, and that in modern practice the copies were never entered until the leases were executed. Many of these leases stated the district to be in the parish.

Merewether, Serjt., for the plaintiff, objected that the book was not evidence without proof of possession of the lands in a manner corresponding to the leases; otherwise it was a mere ex parte document.

TINDAL, C. J. I think the objection ought not to prevail. I remember the same sort of evidence from the office of the Bishop of Durham being received by Mr. Baron Wood.^(a) He thought the document to be in the nature of a public document, and that it ought to be received. The fact of the bishopric of Durham being a county palatine seems to me to make no difference.

The jury returned an ambiguous verdict, and the case was subsequently arranged.

Merewether, Serjt., *Manning*, and *Crowder*, for the plaintiff.

Oderidge and *Follett* for the defendants.

(a) *Humble v. Hunt*, Holt, N. P. C. 601.

PENWARDEN v. CHING.—p. 400.

In an action of trespass for removing boards, on a plea of justification that they obstructed an ancient window through which the light ought to pass, it is sufficient to show that the window was one through which the light ought to be allowed to pass, though the window is proved to have been erected within living memory.

TRESPASS for breaking and entering the plaintiff's premises, and breaking down boards.

Pleas: not guilty; and a justification that the boards were obstructing an ancient window of the defendant, through which the light and air at all times of night ought to enter and pass, and that the defendant entered and removed the same, &c.

Replication, that the light and air ought not of right to have entered, &c, in manner and form as the defendant alleged; and issue thereon.

The window was proved to have been made in 1807, under circumstances from which, connected with the subsequent user, the jury might presume a grant.

Wilde, Serjt., for the plaintiff, contended that at all events the plea was negatived, inasmuch as the window was not ancient, its date being shown.

TINDAL, C. J. The question is not, whether the window is what is strictly called ancient; but whether it is such as the law, in indulgence to rights, has in modern times so called, and to which the defendant has a right, for this is the substance of the plea.

The case was then left to the jury on the right.

Verdict for the plaintiff.

Wilde, Serjt., *Crowder*, and *Follett*, for the plaintiff.

Merewether, Serjt., and *Coleridge*, for the defendant.

See 2 Wms. Saund. 175.

REX v. HAYMAN.—p. 401.

An indictment for non-repair of a road or bridge on a liability *ratione tenuræ*, cannot be sustained where it appears that the tenement on which the liability is charged originated within time of legal memory. On such an indictment parishioners are admissible witnesses for the prosecution.

The inhabitants of a parish are admissible witnesses in an action by the surveyor of the highways against his predecessor for penalties for not accounting, and for the balance of money in his hands.

REX v. REED.—p. 403.

If the examination of a prisoner taken in writing is inadmissible by reason of irregularity, part evidence of what he said at the time of the examination may be received.

INDICTMENT for murder.

The examination of the prisoner by the coroner was inadmissible on account of an irregularity in the mode of taking it, and thereupon, for the prosecution, it was proposed to ask the coroner what the prisoner said on the occasion of his examination. This was objected to, as being properly the subject of the writing, and if that was not admissible, the inferior evidence of the witness's recollection must be rejected.

TINDAL, C. J., overruled the objection, and the coroner stated from memory so much of what the prisoner said as was inquired to.

The prisoner was found guilty, and afterwards executed.

Erle and *Bere* for the prosecution.

Moody for the prisoner.

See 2 Russ. Crim. Law, 658, 2d edit.

Lord EGREMONT v. PULMAN.—p. 404.

reversioner for an injury to the reversion, it is no answer that the injury comes as caused by the wrongful act of the tenant, for which he might be liable to an

the reversioner of a close against the defendant for the non-repair of gutter running through the said close to a mill of the defendant, water oozed through and carried away the soil of the close.

the set up was, that the injury to the gutter, the repair of which was the consequence of a wrongful act of the tenant in possession of penning back the water and watering his meadow.

the evidence to prove this had been heard,

the J., interposed and said, that in point of law he was of opinion that the defence formed no defence to the action. The reversioner is suing for injury to his estate, and I think he cannot be met with the plea that the injury arose out of the wrongful act of the tenant, for which he might have maintained an action against him.

Verdict for the plaintiff, one farthing.

for the plaintiff, *C. F. Williams*, and *Follett*, for the plaintiff.

for the defendant, *Serjt. R. Bayly*, and *Coleridge*, for the defendant

DECISIONS AFTER MICHAELMAS TERM, IN K. B.

10 GEO. IV.—1829.

GILLET v. RIPPON, Gent., One, &c.—p. 406.

an attorney cannot charge the person indemnifying with the costs of defending an action clearly due, unless authorized by him to defend. Quære whether an attorney fully guaranties the petitioning creditor against the expenses of working the bill of bankruptcy on condition of being employed as attorney in it.

the defendant on a guarantee to indemnify the plaintiff against the expenses of the bill of bankruptcy, to be sued out by the plaintiff as petitioning creditor, conducted by the defendant as attorney.

the defendant had sued the plaintiff for his bill of six pounds for work done, being sole assignee as well as petitioning creditor. The plaintiff, paying the six pounds, defended the action, and now claimed sixty pounds of costs paid to the plaintiff in that action, and also his own costs. The defendant contended that the action was not maintainable, it being against public policy, and he cited *Murray v. Reeves*, 8 B. & C. 101, and his Lordship reserved this point.

Campbell then contended that as the plaintiff had clearly no defence to the action of the messenger, he was not bound to defend; the only object being to swell an attorney's bill, he could not charge the defendant with the costs.

Gurney. Notice was given to the defendant, and he might have paid or stopped the action.

Lord TENTERDEN, C. J. I think the defendant is not liable for the costs beyond the writ; a man has no right, merely because he has an indemnity, to

defend an action, and to put the person guarantying to useless expense. If he has the costs of the writ it is quite enough.

Verdict for the plaintiff, 10*l*.(a)

Gurney and White for the plaintiff.

Campbell and Comyn for the defendant.

(a) See *Knight v. Hughes*, 14 E. C. L. Reports.

LEVY v. POPE, Esq., Sheriff of Surrey.—p. 410.

The attorney conducting a cause in court may be called as a witness by the opposite side, and asked who employs him, in order to show the real party, and so let in his declarations.

CASE against the sheriff for omitting to execute a writ of fieri facias, by taking certain goods of the debtor within his bailiwick.

The officer charged with the execution of the writ was one Denton, and on a difficulty occurring in proving this as against the sheriff; the *Attorney-General*, in order to prove Denton to be the real defendant, called the attorney who conducted the defence, and asked him who employed him to defend the cause.

Campbell objected to his answering, it being a breach of the confidence between attorney and client.

PARKE, J. No, I think not; he may be asked between whom the relation exists, to show who is the real defendant, in order that his acts and declarations may be admitted.

Verdict for the defendant.

The *Attorney-General* and ——— for the plaintiff.

Campbell for the defendant.

REID and Another v. BATTE.—p. 413.

Where a man is employed to do work under a written contract, and a separate order for other work is afterwards given by parol during the continuance of the first employment, the written contract need not be produced by the plaintiff in an action for the second work.

ASSUMPSIT for work and labour.

The plaintiffs were plasterers, and brought this action to recover 30*l*. for an ornamental entablature placed in the front of some houses which the defendant was building.

The plaintiffs had been employed to do the inside work of the house under a written contract, as it appeared on cross-examination of the witness for them, who said that he had so understood from his masters; and that from the beginning, during the progress of the inside work; but that whilst that work was going on, he heard a new order given for the entablature.

The contest in the progress of the cause was which side should produce the contract, and after some discussion it was, by consent, read by the plaintiffs.

Lord TENTERDEN, C. J., then said, If I had been to decide, I should certainly have said on this precise state of facts, that it was not imperative on the plaintiffs to produce the contract. So much injustice has been frequently done by a rigid adherence to this rule, that I should certainly be reluctant to carry it into strict execution. Otherwise it might happen, as it sometimes does, that the party is turned round for want of a stamp, or at all events put to the unnecessary expense of the penalty and stamping the instrument, when on looking at it, it might appear that it had nothing to do with the claim. I am more anxious to say this, now that no decision is required for the purposes of the case, than I should have been had not the counsel agreed.

Verdict for the plaintiffs.

Holt for the plaintiffs.

Campbell and *R. S. Richards* for the defendant.

See *Vincent v. Cole*, 14 E. C. L. R. 490. The principle which distinguishes the cases in which the production of written documents is compelled, from those in which it is not, is sufficiently clear, although it is often difficult in practice to ascertain the exact line of separation between the two classes. Wherever the contents of the writings are involved in the question in the cause, the writings themselves must of course be produced; wherever they are not so, they need not, even though it may be material to show that some communication was had between the parties, and it is proved that this communication was in writing. In the principal case there was express evidence that the work in question was done under a new order, perfectly distinct from that contained in the written agreement under which the rest was executed. Even the existence therefore of this written agreement was quite immaterial to the case; and the decision was not involved in those difficulties which sometimes occur where it is necessary, for the purpose of explaining some part of a party's conduct, to show that it was after communication with the other: and it is doubtful whether that fact is sufficient for the explanation, or whether it is necessary to show the particulars of the communication. In the case of *Vincent v. Cole*, on the other hand, the contents of the written agreement were the very matters in question. With respect to the extras, the whole evidence was that of a witness who put his construction on the agreement, and thought that the items were not included in it; and it was necessary that the agreement should be produced to ascertain the justice of that construction: and even with respect to the party wall, the evidence relied on did not amount to proof that it was independent of that agreement, no separate order for it being shown, and the promise to pay for it being of a very equivocal application to that question.

BRETT v. BEALES and Others.—p. 416.

An old deed between a public body claiming tolls and others liable thereto, regulating the amount of payment, is evidence in the nature of reputation of the existence of the tolls.

In an action for tolls claimed by a Corporation, an ancient schedule produced from among their muniments, copies of which were delivered by their officer to the lessee of the tolls, and by the lessee to the collectors, by which they have actually collected, is admissible in evidence for the Corporation.

Contra, when the copies in the hands of the lessee are not shown to have been delivered to him from the Corporation, although they correspond accurately with the old schedule.

An act of parliament, private in its nature, is not made admissible in evidence against strangers by a clause declaring "that it shall be deemed and taken to be a public act, and shall be judicially taken notice of without being specially pleaded."

A canal act is not rendered a public act by containing provisions empowering the company to regulate and take tonnage, rates, and tolls, from persons using the canal.

It is not a sufficient consideration for a toll thorough claimed for passing on all roads within a town, that the party claiming it has repaired one road, a wharf, and a bridge. Where the king before the time of legal memory, was entitled to the soil of the town of C. and to toll traverse within it, and afterwards granted to the burgesses of the town, "the town of C. with all its appurtenances;" these words are sufficient to pass the toll.

ASSUMPSIT for tolls.

The plaintiff was lessee of tolls under the Corporation of Cambridge, and brought this action to recover the amount of tolls claimed to be due to that body.

The plaintiff produced an award made in the reign of Henry VIII., and a composition deed reciting the award, and made in pursuance of it, for regulating certain disputes between the University and town of Cambridge. By the 19th clause of the award the toll to be taken by the Corporation was fixed at a certain sum.

The *Attorney-General* for the defendants. I object to the receipt of this award as evidence, unless it is shown that it has been acted upon; and in point of fact, no such evidence can be given; the tolls, when any have been taken, have varied from those here prescribed. In the former trial of this case, an award between the borough of Cambridge and the borough of Lynn was rejected on the ground that it was not shown to have been acted on.

Lord TENTERDEN, C. J. Yes, that was an award only; there was no deed.

The *Attorney-General*. The deed derives no authority from being made in pursuance of the award; and if not, it can be no evidence for the Corporation: it is no more than one of the private title deeds of the party, made between him

and other parties to whom we are strangers; and by which therefore we cannot be bound.

Campbell. The only ground on which these papers can be evidence is, that they prove reputation as to the toll. In a case on the Oxford circuit, before Dampier, J. (*R. v. Cotton*, 3 Camp. 444), on a question as to a highway, an award was offered as evidence of reputation; but the learned judge rejected it, considering that the mere circumstance of there being an award proved it to have been made *post litem motam*.

Taunton for the plaintiff. Certainly the defendants do not in any way claim under the University; but on a question of public right like this, that is immaterial. The record of a judgment in a suit between the Corporation and an individual resisting the payment of toll would be evidence in this cause, though the defendants were strangers to that individual. In the same manner here, though the award is not the record of a public court, yet it is a decision between the University and the Town on a public matter; and therefore evidence of reputation. It is not affected by any question as to the *lis mota*. The present litigation had not commenced; or if *lis* is to be understood in the more general sense of a dispute, there was then no dispute on this subject. The University did not deny the general right to toll, but only excepted to the manner and amount of the levy.

Patteson. The common evidence is that toll was demanded and submitted to; this solemn submission by deed is surely much stronger.

Lord TENTERDEN, C. J. The deed recites the award, so that the plaintiff will have the full benefit of the award by reading the deed only. I agree that the deed derives no additional authority from being made in pursuance of the award: but I think that I ought to receive the deed on its own account. In this case reputation is admissible evidence: and certainly a solemn deed, under the seals of the University and the Corporation, relating to the tolls in question, is admissible evidence of reputation respecting them. The objection that the deed does not appear to have been exactly followed in practice, applies rather to the effect than to the admissibility.

The deed was then read.

An award between the Corporations of Cambridge and Northampton was afterwards put in, made in 11 H. 8, whereby the freemen of Northampton were discharged of toll at Cambridge, in consideration of an annual payment of 10s. by the Corporation of Northampton to the Corporation of Cambridge. *Taunton* had undertaken to give evidence of the payment of this composition of 10s.; but on the production of the Corporation books, in which it had been supposed that the treasurer of the Corporation had charged himself with the receipt of the money, it appeared that he had only returned it as in arrear, and the evidence of the award was struck out.

Tabrum, a clerk in the town clerk's office in 1814, proved that he had made several copies from an old table of tolls in the handwriting of the reign of George I., which he found in the town clerk's office, and which was endorsed "Table of tolls at Cambridge," in the handwriting of the town clerk who had been so for some years in 1814. These copies were afterwards in the possession of the persons employed by Edwards, the lessee of the tolls, to collect the tolls; and these persons said that they received the copies from Edwards, and collected according to them.

Taunton, for the plaintiff. I now propose to read the original table. On the former trial (*Brett v. Fisher*, sittings after Michaelmas Term, 1827), the same evidence was given, with the exception of Tabrum's testimony. Then the evidence was rejected because the plaintiff had not shown the papers by which the collectors made their collections to be copies of the table, or delivered to them as such. The evidence was only that they had since been compared with it and found to correspond.

The *Attorney-General*, for the defendants. I do not object to the receipt of

the copies as a convenient mode of showing how the collections were made; but the object is to put in the original document as an ancient writing, carrying back the recent scale to the age of George I. For this purpose it is not admissible. The table is only seen in the town clerk's office; that is not the place for keeping the muniments of the Corporation; it ought therefore to be proved that the clerk had it from the Corporation muniment room. But even if it came thence, a document in the possession of the Corporation is no evidence for them, unless acted on; so that the whole evidence is that of the actual collection; to prove the mode of which, I do not object to reading the copies.

Alderson. On the former trial, when the evidence was rejected, the proof was in substance exactly the same. The papers by which the collection was made were then shown to be copies of the others by actual comparison: it carries the case no farther than that the person who made the copy is produced. It makes no difference whatever in the principle.

Taunton, in reply. The deficiency in the former case was, that no evidence was given that the copies were received from the Corporation for the purpose of collecting. That is now supplied. On the former evidence, Edwards might have made out the scale from other information; and its correspondence with the old table might have been merely fortuitous.

Lord TENTERDEN, C. J. The difference between this and the former case is, that the proof then only was that the collectors received the papers from Edwards, and that on being recently compared with the parchments, they were found to correspond. There was no proof how they came to Edwards. Now it appears that they were made in the town clerk's office by direction of the town clerk, and that they passed thence to Edwards. I think on that state of facts I ought to receive the evidence. It will stand thus: in 1814 this original parchment, which is of ancient date, was in the town clerk's office; it was copied there, and the copies delivered to the lessee of the tolls, who delivers them to the collectors, and they collect by it. I think this evidence receivable. What its effect may be is another question. I have a note of the objection.

For the plaintiffs it was proposed to read from a copy printed by the King's printer, an act of the 52 G. 3, c. 141. The act is entitled "An Act for making and maintaining a navigable canal with aqueducts, feeders, and reservoirs, from the Stort Navigation at or near Bishop's Stortford in the county of Hertford, to join the river Cam near Clay-hithe Sluice in the county of Cambridge, with a navigable branch or cut from the said canal at Sawston to Whaddon in the county of Cambridge."

It was proposed to read the 58th section, which recites that the Corporation of Cambridge are entitled to divers tolls, and that those tolls might probably be diminished by the establishment of this navigation; and then provides for the letting those tolls by auction, and that if the rent be less than 400*l.* per annum, the Canal Company is to make up the deficiency.

By the 122d section, the company were empowered "to ask, demand, take, and recover, to and for their own proper use and behoof, for the tonnage of all goods, wares, and merchandise, and other matters and things whatsoever, which shall be carried or conveyed upon the said canal and cut, a rate or sum not exceeding three pence per ton per mile, all which rates shall be paid to such person or persons, at such place or places, in such manner, and under such regulations, as the directors of the said company shall from time to time direct or appoint," with power to recover the same by action or distress. "And the said directors of the said company shall have full power from time to time to lower or reduce all or any of the rates hereby granted, and again to raise the same to such sums as they shall think proper, not exceeding the sums herein mentioned, as often as it shall be deemed necessary for the interests of the said navigation."

By the 166th section it was enacted, "that this act should be deemed and taken to be a public act, and shall be judicially taken notice of as such by all judges, justices, and others, without being specially pleaded."

The contemplated canal was never made.

The *Attorney-General* for the defendants objected to the receipt of this evidence. The 166th section is a clause introduced in a large class of these acts, and it is therefore important to come to a correct decision in this case. The only operation of that clause is to prevent the necessity, in any legal proceedings in which the act comes in question, of setting it out in the same manner as a private deed upon the record: it goes no further: it is merely to facilitate those proceedings, and does not alter the character of the act as public or private, which depends merely on its object and provisions. Now what is the nature of this act? a mere private arrangement, never even acted on, between the projectors of the canal and the proprietors of the contemplated line, the Corporation of Cambridge among others. These private acts have always been treated as mere contracts between individuals; and their recitals are of no more value than the recitals of any private deed. They in no way bind the inhabitants of the town or strangers: the most that they amount to is a bargain between the adventurers and corporation.

Campbell. The bill not being a public act can only be proved, even if it has any operation on this question, by an examined copy of the act from the parliament roll.

Taunton for the plaintiff. The legislature call it a public act by s. 166: and if a public act at all, it is so to all intents and purposes; and among others for the mode of proof.

But besides this, the act is in itself of a public nature. Any act which affects all the king's subjects is so; and this act by s. 122 gives to the Canal Company the high prerogative of taxing all the king's subjects. Such an act as this has never been treated as a mere private contract; though those words may have been applied to some local acts. Being then a public act, both in its nature and by the express declaration of parliament, I use it, not merely for its recitals in the preamble of the section, but as a legislative recognition of the existence of those tolls, for the diminution of which a remedy is provided.

Storks, Serjt. If the act is brought forward by legal evidence, the Court must notice it whether a public or a private act: the distinction between them is as to the mode of authentication, not to the effect when authenticated. The recitals in the preamble are evidence of the facts contained in them. *R. v. Sutton*, 4 M. & S. 582.

Campbell. *R. v. Sutton* proceeded expressly on the ground that it was a public act.

The *Attorney-General* in reply. The argument for the plaintiff applies equally well to any private estate bill, and to all rights of individuals. For instance, in the present act there are clauses protecting certain lands stated to belong to Lord Braybrooke, and other proprietors on the line of the canal, from interference. If Mr. *Taunton's* argument were correct, this would be a legal recognition of their title, and enable them, without other evidence, to recover against anybody in trespass or ejectment. So there is a clause, s. 57, stating the corporation to be alone entitled to erect cranes or landing and weighing machines in Cambridge, and to receive payments for the use of them. Surely this could not be treated as evidence of that right. It is obvious that it is the mere agreement of certain parties, as to what shall, between them, be considered as their rights respectively: and in point of fact, if a bill of this kind is unopposed, and conforms with the rules of parliament, it passes as a matter of course, without inquiry.

Lord TENTERDEN, C. J. The point is quite new, and of great importance, as it will apply to so large a class of statutes. I will therefore consult my learned brothers on it to-morrow morning, as the cause will not finish to-night, and they will then be here.

On the morning of the 17th his Lordship did so, and on returning into Court said, Two grounds have been laid for the admission of this evidence: the one, that the concluding clause renders it admissible as a public act: the other, that even independently of that clause, it is so from its nature. The answer given to the first was that the clause only applied to the forms of pleading, and did not

vary the general nature and operation of the act. I was inclined to that opinion at the time, and my learned brothers agree with me in that impression. We also think that the second ground fails. It is said that the bill gives a power of levying a toll on all the king's subjects, and therefore the act is public: the power given is not so extensive, it is only to levy toll on such as shall think fit to use the navigation. The ground therefore on which it is said the act is public, and the evidence admissible, fails; and I cannot receive it.

The evidence was accordingly rejected.

No repairs were proved to be done to any *roads* by the Corporation, with one exception, although they had repaired a bridge and a wharf; and the toll appeared to be taken indiscriminately at all entrances to the town.

To prove the antiquity of the toll, an extract from Domesday book was produced, whereby it appeared that at that time the town of Cambridge belonged to the king, who received from it certain "*consuetudines*." There was much discussion on the meaning of the word *consuetudines*, the plaintiff contending that it meant tolls, the defendants customary rents: but nothing material was decided on its interpretation.

Two extracts from the Pipe Rolls of 31 H. 2 and 1 John were also read, showing that at those times the burgesses of Cambridge had had their town to farm of the crown, in consideration of a payment, in one instance of 300 marks, in the other of 250. The town thus continuing in the hands of the crown, King John, in the 8th year of his reign, granted a charter, of part of which the following is a translation.

"We have granted and by this our charter confirmed to our burgesses of Cambridge the town of Cambridge with all its appurtenances, to have and to hold for ever of us and our heirs to them and their heirs," rendering therefore 60*l.* for all services, "wherefore we will and firmly enjoin that the aforesaid burgesses and their heirs shall have and hold the before-mentioned town, with all its appurtenances, well and peaceably," &c.

Lord TENTERDEN, C. J., in summing up to the jury said, There are two sorts of toll recognised by the law, toll traverse, and toll thorough; and the plaintiff will be entitled to a verdict on the pleadings in this case, if he establishes his title to either. Where a party has the burden of repairing public highways, he may, though those were public ways at the time that the liability to repair commenced, be entitled to take toll in consideration of those repairs; and that is toll thorough. The public however having an antecedent right to the use of the ways, he can only be so entitled by virtue of such consideration; and for that purpose the plaintiff in this case attempted to prove that the corporation of Cambridge repaired the roads and streets there. He has only proved that they repaired a single road: and having failed to prove that they repair *all* the roads and streets in Cambridge, where they claim the toll, the consideration fails, and they cannot be entitled to toll thorough.(a)

They may however be entitled to toll traverse. That arises, when the owner of the soil dedicates it to the use of the public; but, at the time of the dedication, reserves to himself toll from those who pass over it. The reservation must be made at the time; and in this case therefore it must have been made before the time of William the Conqueror, for it appears from Domesday book that there was then a town, and highways of some standing at Cambridge. At that time the town belonged to the king, and if he or his predecessor, at the time when highways were first made there, reserved toll to themselves for passing over them, he would at that time be entitled to toll traverse. Of that you must judge from the expressions in Domesday book, and from the evidence of later usage, to which you may presume a rightful beginning, if any such can by law be devised. If at that time the king was entitled, not only to the soil, of the town, of which there is no doubt, but also to toll traverse within it, I am of

(a) S. P. Truman v. Walgham, 2 Wils. 296.

opinion that the right to toll would pass to the burgesses, by the grant of the town with its appurtenances in the charter of King John, without any more express words relating to it. (a) Verdict for the defendants.

Taunton, Storks, Serjt., Putteson, and Barker, for the plaintiff.

Scarlett, A. G., Campbell, Alderson, Eagle, and Gunning, for the defendants.

In Hilary term *Taunton* moved for a new trial on the ground that certain entries in the corporation books with respect to the tolls, such as orders made for granting leases of them, the appointment of committees to manage them, &c., which had been rejected at the trial, ought to have been received as evidence that the corporation then dealt with tolls; and he urged that there was a distinction between the books of a corporation, to which all members of the corporation, and even an inhabitant who was the relator in a quo warranto, though not a member of the corporation, had access. He also moved on the ground of a misdirection by Lord TENTERDEN, in telling the jury that the repairs proved were not a sufficient consideration for the toll claimed, treating it as toll thorough. On the first point, the Court immediately refused the rule, referring to *Phill. Ev.*, and denying the existence of any distinction, in a case merely affecting the private property of a corporation, between the books of a corporation and of an individual. On the latter point, they took time to consider whether they should grant a rule or not; and finally the rule was refused.

(a) The Attorney-General in his address to the jury, in commenting on the leases of tolls produced, had treated them as void for want of specifying the amount of the tolls, and had stated that *Montague, J.*, in the case of *Maldenhead in Berks, Palmer, 86*, had considered that a grant of tolls by the crown was void for the same omission.

In that case, however, the three other judges were of a contrary opinion: and their opinion is adopted by Chief Baron Comyns in his *Digest, Toll, E.*

DUKE v. POWNALL.—p. 130.

Several persons having agreed to bear equally the expenses of a joint undertaking, in an action brought against one of them, another of the contractors is a competent witness for the defendant if released by him, though the rest do not join in the release.

ASSUMPSIT for goods sold and delivered.

The defendant was sued as one of the committee for managing a public meeting and preparing and procuring signatures to a petition against the bill for the relief of his Majesty's Roman Catholic subjects from disabilities.

By one of the resolutions of the committee, if the funds collected by subscription should prove inadequate to the expenses incurred, the committee were to bear the deficiency in equal proportions. Considerable expenses were incurred, and at the time of the trial there were many outstanding claims.

A witness called for the defendant acknowledged on the *voire dire*, that he was a member of the committee, and the defendant released him.

Campbell for the plaintiff. The release does not render the witness competent. The defendant indeed can maintain no action against him; but he may recover against any other member of the committee, and that member may recover against the witness a proportion of any sum which he is forced to pay. Even if that be not so in the common case, where there is only a single transaction, it is here, where there are complicated accounts to adjust, and the deficiency is to be equally borne by the parties. Any payments made by another member of the committee to contribute towards this verdict would be good payments by him on account of the expenses of the committee: and if he should finally be found to have paid more than his share, he would have a remedy against the witness among others for that excess, part or the whole of which will have resulted from the present action.

The *Attorney-General* for the defendant. The present defendant, in any action which he may bring against another member of the committee for contribution, can only recover that member's share of the verdict in the present action: and that member consequently can recover nothing against the witness, or any other member of the Committee, because, having paid only his own share, he has paid nothing in discharge of them. The first ground therefore fails: and the complication of accounts in this case makes no difference; for the defendant by his release takes the witness's share of the debt upon himself, and could not charge any other member with anything in respect to it.

Lord TENTERDEN, C. J. I think the witness is competent. The defendant can recover against each member nothing more than his rateable share; and as each would pay no more than that, and no more in consequence of the release than without it, no one would have any claim against the witness in consequence of such payment. But it is said that there are accounts to be taken; that the payments made in discharge of this debt would be allowed in taking the accounts; that the witness is liable for any deficiencies; and that this renders him incompetent. I think not. If any member called upon by the defendant for contribution should finally, on the general balance of the accounts, be found to have paid more than his share of the deficiency, so far as that over-payment shall have resulted from the payment obtained in consequence of the present proceedings (if indeed that be possible), I think he must have recourse to the defendant, who has released the witness, and not to the witness himself.

Verdict for the plaintiff.

Campbell and *F. Kelly* for the plaintiff.

Scarlett, *A. G.*, *F. Pollock*, and *Ellis*, for the defendant.

Where several are charged in respect of a joint liability merely, without any joint fund or property, it would seem that the release would clearly make any one a witness for another, because, as the persons jointly liable to strangers, are only liable in contribution each for his own proportion, the only claim that could be made on the witness after payment would be by the one paying, and that claim would be barred by the release; the others would have no claim on him, nor would their liability be increased by the release, because, as the non-contribution of the releasee arises out of the act of the releasor to which they are no parties, he cannot thereby increase the proportions due from them. And this would be so however many different demands there might be, as well as when there is only one, because each particular case of payment would only give a claim to the payer against each of the others for his proportion. *Wright v. Hunter*, 1 East, 20, S. C. 5 Ves. 792. But in partnership, where a joint property and a joint fund exist, the same reasoning would not decisively apply, for the defendant, against whom the verdict went, might have recourse to the joint fund to satisfy the debt, and so expose the witness to other demands from third persons, which, without this payment, might have been satisfied out of the joint fund.

It is not easy to see how a payment by one partner or person jointly liable could cause any overpayment by a third partner, as is supposed in the argument in the principal case. As amongst partners when one becomes a bankrupt, and one of the remaining solvent partners pays the whole debt, it would seem that at law he can only claim against the other solvent partners their original proportion. *Cowell v. Edwards*, 2 B. & P. 268. *Deering v. Winchelsea*, ib. 270. *Collins v. Prosser*, 1 B. & C. 682. *Browne v. Lee*, 6 B. & C. 689. In equity the rule of contribution seems different. See *Peter v. Rich*, 1 Cha. Ca. 34. *Ex parte Watson*, 4 Madd. 477, S. C. 1 Buck. 450. *Ex parte Smith*, 1 Buck. 492. *Ex parte Hunter*, ib. 552. *Stone v. Yea*, Jacob, R. 426. It would be doubtful what the rule of contribution would be when in action against three partners bankruptcy is pleaded by one, and a nolle prosequi entered, and there is a verdict against the other two, and execution issues, and payment is made by one.

REX v. GUTCH, FISHER, and ALEXANDER.—p. 433.

In an indictment for libel, the proprietor of a newspaper is *prima facie* answerable for what appears in it; but the presumption arising from proprietorship may be rebutted and an exemption established.

THIS was a criminal information filed by the *Attorney-General*, for a libel published in the *Morning Journal* newspaper.

The defendants were proved to be proprietors of the newspaper in the usual

manner by their affidavit filed at the Stamp Office; and the newspaper containing the article charged as libellous was read. No other evidence was offered.

F. Pollock for the defendant Gutch, stated that even taking the paper to be libellous, still he was in a condition to show that Mr. Gutch was perfectly innocent of any share in the criminal publication, as he was living at the time at a country residence more than a hundred miles from London, without taking any share whatever in the actual publication of the newspaper in London; the whole of which was conducted by the managing proprietor, Alexander; and that in fact he was himself confined to his house by illness when the paper complained of appeared. Now this being so, it is impossible to infer a criminal participation, inasmuch as he could not but be ignorant of the nature and character of the particular article. The notion that the proprietor of a newspaper is necessarily responsible criminally for the act of his partner or agent, is against the universal principle of criminal law, that a malicious intention is essential to constitute guilt in the agent, whatever the act is; even the act of killing another is merely presumptive evidence of murder, and may either be mitigated, or explained away altogether, by the particular circumstances, and the intention of the party. The mere employment of another to conduct and publish a newspaper is lawful; it may be intended by the principal to be conducted lawfully and beneficially for the public: and although the proprietor, by furnishing capital, may be said to cause the publication of a newspaper, he cannot be said "knowingly and unlawfully to cause to be published" a libel, unless he knows its contents, and intends that his agent should publish that which is libellous. To hold otherwise, will be to carry the responsibility of a principal or partner further in criminal cases than it is extended even in civil cases; for although a principal is liable civilly for the negligent acts of his servant, he is not so for the intentional wrongs of the agent, though he has himself furnished the means or instrument of committing the wrong, these means being provided and intrusted with the servant for a lawful purpose. It is therefore altogether at variance with the known principles of law, in every other criminal or civil case, to hold that as against Mr. Gutch the case established is conclusive of his guilt, even admitting it to furnish any presumption at all. But inasmuch as some modern authorities appear to have held such proof to be decisive against a defendant, it becomes necessary to examine those authorities, and to see how far they are binding as such, contrary as they are to reason and justice. It must be admitted to have been ruled in *Rex v. Walter*, 3 Esp. 21, that the proprietor of a newspaper is criminally answerable for the publication of a libel by his servants, though he himself has nothing to do with the publication, and the same doctrine was acted on in *R. v. Cuthell*; (a) and in *R. v. Almon*, 5 Burr. 2686, it was held that the publication by the servant was *primâ facie* evidence against the master; but Lord Mansfield expressly says that it may be answered by contrary evidence, showing "that he was not privy nor assenting to it, nor encouraging it." And in *Hawkins P. C. lib. 1, c. 73, s. 10*, similar doctrine is laid down with "as it is said," and authorities to the contrary cited. But it is remarkable that these modern authorities are not only unsupported by the more ancient, but are at variance with the better and more just principle as laid down in the older cases. The first case in which the doctrine contended against was laid down, and on which the others must rest as their foundation, is *Rex v. Dodd*, 2 G. 2, 2 Sess. Cas. 33. This was certainly the dictum of the court in granting a criminal information. But in *R. v. Nutt*, when the jury refused to find any but a special verdict on similar facts, the Attorney General did not dare to accept it, and a juror was withdrawn. 1 Barnardiston, 306, Fitzgibbon, 47. But the true doctrine and principle of criminal responsibility is fully expounded in *Lamb's case*, 9 Co. 59, S. C. Moore, 813, where it was resolved "that every one who shall be convicted in the said case, either ought to be a contriver of the libel, or a procurer of the contriving of it; or a *malicious publisher of it, knowing it to be a libel*; for if

(a) See Erskine's Speeches, vol. 5.

one reads a libel, that is no publication of it; or if he hears it, it is no publication of it, for before he reads or hears it he cannot know it to be a libel; or if he hears or reads it and laughs at it it is no publication of it; but if after he has read or heard it, he repeats it or any part of it in the hearing of others, or after that he knows it to be a libel, he reads it to others, that is an unlawful publication of it; or if he writes a copy of it and does not publish it to others, it is no publication of the libel; for every one who shall be convicted ought to be a contriver, procurer, or publisher of it, *knowing it to be a libel.*"

When therefore the reason and principle are one way, and are supported by the ancient authorities, though not by certain modern cases, the jury should have the sanction of the court in following and acting on the ordinary principles of justice and good sense, and it is therefore unnecessary to Mr. Gutch's defence to discuss the particular merits of the paper in question, as to its libellous or innocent character.

F. Pollock called one witness, a servant in Gutch's house, who stated that at the time of the publication, Gutch was living in Worcester in an ill state of health, and was not interfering with the conduct of the paper at all, as far as she knew; and that he was at the same time editor of a Bristol paper.

Lord TENTERDEN, C. J., in summing up said; On the part of Mr. Gutch it is contended that a proprietor of a newspaper who is not shown to take, or who can show that he took no part in the publication of the newspaper, and of the libel in question, is not criminally responsible. Now whether it is so shown in this case is a fact for you to consider, but I am bound to state the law as I have received it from my predecessors. I cannot propose to you a different rule from what I find adopted by those who have filled my situation before me. Now it is conceded that it has been held in several cases that a proprietor so situated is criminally answerable. But it is said that this is a different principle from that which prevails in all other criminal cases; but this does not appear to me to be so, the rule seems to me to be conformable to principle, and to common sense; surely a person who derives profit from, and who furnishes means for carrying on the concern, and intrusts the conduct of the publication to one whom he selects, and in whom he confides, may be said to cause to be published what actually appears, and ought to be answerable, although you cannot show that he was individually concerned in the particular publication. It would be exceedingly dangerous to hold otherwise, for then an irresponsible person might be put forward, and the person really producing the publication and without whom it could not be published, might remain behind and escape altogether.

The jury found all the defendants guilty.

Scarlett, A. G., Sugden, S. G., Gurney, Brougham, Alderson, and Wightman, for the prosecution.

F. Pollock and *Hill* for Gutch.

Barstow for Fisher.

Alexander in person.

In *R. v.* the same defendants on another exofficio information, which was tried on the following day,

Lord TENTERDEN, C. J., in summing up said, I tell you to-day, as I thought myself bound to tell the jury yesterday, that the proprietor of a newspaper is criminally answerable for what appears in it; I do not mean to say, nor ever did mean to say, that some possible case may not occur in which he would be exempt, but generally speaking he is answerable.

The defendant Gutch was brought up for judgment in Hilary Term following, and discharged on his own recognisances.

REX v. MARSDEN, ALEXANDER, and ISAACSON.—p. 439.

When the Attorney-General or King's counsel appears officially as such to conduct a prosecution on an indictment for misdemeanor, he is entitled to reply though the defendant calls no witnesses.

JOHNSON and Another v. LORD and Others.—p. 444.

In an action against excise officers for a seizure, the notice of action must be proved in the first instance before any other evidence is given. The plaintiffs slept at different houses, away from their places of business, but a servant slept on the premises of the latter. *Semb.* that the place of business may properly be described in the declaration as a dwelling-house of the plaintiffs. *Quære*, whether the notice of action properly describes the plaintiffs as of the place of business, the statute requiring it to state their place of abode.

WALLACE and Others v. SMALL and Others.—p. 446.

An offer of a specific sum by way of compromise is admissible in evidence, unless accompanied with a caution that the offer is confidential.

ASSUMPSIT on a charter-party.

There was some difficulty in fixing the defendant with the contract. It appeared, however, that after the action was brought, an offer of a specific sum had been made; and evidence was given on the part of the plaintiffs, that a friend of theirs in consequence went to the defendants and advised them to increase their offer, and that the defendants refused to do so, saying "We shall lose enough by the charter-party as it is." The witness stated that nothing was said about this communication being without prejudice.

The *Attorney-General* for the defendants, said that the evidence was inadmissible. From the very nature of the transaction it appears to have been a negotiation for a compromise; and if so, it must be understood to be without prejudice, although nothing is said on that subject at the time; nor does it, even if admitted, amount to any proof of liability.

Lord TENTERDEN, C. J., however, admitted it, and said he thought it good *prima facie* evidence of liability. It is not said to be without prejudice, and an offer to compromise may be very well made, without any restriction as to confidence.

Verdict for the plaintiffs.

Williams and Brodrick for the plaintiffs.

Scarlett, A. G., and Alderson, for the defendants.

Similar evidence was admitted in a case of *Watts v. Lawson*, tried before Lord Tenterden, C. J., Jan. 14th, 1830. This was an action upon the case for libel; and the plaintiff was allowed to show, in aggravation of damages, that his attorney met the attorney for the defendant (the editor of the *Times* newspaper) shortly after the publication of the libel, and immediately after giving notice of action; that they met for the purpose of adjusting the terms of an article proposed to be inserted in the paper; that they agreed upon such an article, and that upon its insertion, the action should be abandoned; and that finally the article was never inserted.

Verdict for the plaintiff.

Denman, Alderson, and Tomlinson, for the plaintiff.

Scarlett, A. G., Brougham, and Platt, for the defendants.

Nicholson v. Smith, 3 Stark. N. P. C. 128.

HILL and Another, Assignees of MURDOCH, v. HARRIS.—p. 448.

A debt for money let on mortgage, conditioned for payment after six months' notice, such notice not to expire before a certain day, is a good petitioning creditor's debt to support a commission sued out before that day.

TAYLOR and Another v. TRUEMAN and Others.—p. 453.

East India Company's warrants are not negotiable instruments within the 6 G. 4, c. 94, s. 2, as they pass by delivery and not by endorsement. Where defendants, receiving a pledge from a factor for an antecedent debt, sell it, they cannot under 6 G. 4, c. 94, s. 3, hold the proceeds against the real owner, but are liable to him in trover: but in estimating the damages they are entitled to credit for the balance, if any, due from the owner to the factor.

SITTINGS IN AND AFTER MICHAELMAS TERM, IN C. P.

10 GEO. IV.—1829.

**SMITH, Assignee of BULLOCK, a Bankrupt, v. MOON and Others.
p. 458.**

If a trader in his own house hears himself denied to a creditor, and does not come forward, this, if done with intent to delay creditors, is an act of bankruptcy, though he has given no directions to be denied.

FINDEN v. WESTLAKE, Gent. One, &c.—p. 461.

In an action on a libel for publishing a hand-bill offering a reward for the recovery of certain bills of exchange, and stating that A. B. is suspected of having embezzled them, it is a good defence on the general issue, that the handbill was published solely with a view to the protection of persons liable on the bills, or to the conviction of the offender.

Evidence is admissible in such a case, that the party publishing the hand-bill followed it up by preferring a charge of the same nature against A. B., before a magistrate.

CASE for malicious prosecution and libel. Plea, the general issue.

The libel was a hand-bill published by the defendant, offering a reward for certain bills of exchange lost from his possession, which were described in the hand-bill, "and which Mr. Westlake believes to have been embezzled by his clerk." The plaintiff was the clerk to whom the hand-bill referred.

There was no plea of justification; but the plaintiff contended that the hand-bill furnished no ground for an action, being published *bonâ fide*, not for the purpose of injuring the plaintiff, but of protecting the defendant, who was himself liable on the bills, from the consequences of their negotiation; of preventing other persons from ignorantly taking them; and perhaps also of bringing to justice the guilty party, whether he might prove to be the plaintiff or any one else. No objection was made to the admissibility of this defence on the general issue; and in summing up to the jury, TINDAL, C. J., said, "The general rule is that, in actions for libel, nothing short of the actual truth of the statement is an answer to the charge: but there are privileged cases, in which

the publication proceeds from a proper motive, and the party acting on his belief, and acting honestly, is protected. That may be the case with such a publication as the present. If you think it was made in the opinion that it was necessary either for the purposes of justice with a view to the discovery and conviction of the offender, or for the protection of the defendant himself against the liability to which he might be exposed on the bills, and that these, or either of these, were the defendant's only inducements to the publication, you may give him a verdict on the counts for the libel. It does not seem to me however that the libel will bear that construction: the introduction of any mention of the plaintiff could not be necessary for the protection of the defendant, or for the information which he might wish to give to bill-brokers or any other persons to whom the bills might be passed, for the description of the bills was all the information wanted for this object: and it could not be necessary for the purposes of justice, for the plaintiff was the party whom the defendant suspected, so that he did not require information as to the supposed criminal; nor had the plaintiff absented himself, so as to render it necessary to mention him with a view to his apprehension.

Verdict for the plaintiff, damages 200*l.*(a)

A question had previously arisen on the evidence admissible on the part of the defendant, who had claimed to prove that a few days after the publication of the hand-bill he had actually preferred a charge against the plaintiff at a police-office, of the embezzlement of the bills mentioned in the placard. He tendered this evidence to show that the hand-bill contained only a statement of what he believed, as he had acted upon the opinion which he expressed in it; and he accordingly asked a witness what statements he had made on that occasion before the magistrate, in the presence of the plaintiff. This was a distinct charge from that complained of as a malicious prosecution in the first counts of the declaration.

Wilde, Serjt., for the plaintiff, objected to the receipt of the evidence. The fact that the defendant made a charge of the embezzlement of the notes may perhaps be evidence on the ground suggested; but at all events, the particulars of it cannot be proved. A party against whom such a charge is made before a magistrate, is not sufficiently uncontrolled at the time to render a statement made in his presence evidence against him; for such evidence can only be given against him on the ground that his silence or conduct amounts to an admission of the facts stated.

This was recently so held in a case at Worcester,(b) and is a necessary consequence of the principles on which such evidence is ever admissible.

TINDAL, C. J. If the fact of the defendant's having made such a charge is admissible at all, it can only be proved by showing what was the charge which he made. The question in this case will be what was the animus of the publication: and this evidence is tendered on the ground that it will show that the defendant, in publishing this placard, acted *bonâ fide*, for that he did afterwards prefer a charge of the nature contained in it. Whether the charge preferred will support this inference must depend on the particular nature of it: we must therefore hear its particulars to know how far it corresponds with the imputation in the hand-bill. It is for this purpose, and for this purpose only, that I receive it; not as evidence of the facts contained in the charge, for which purpose it was tendered in *Melan v. Andrews*. The defence here is, not that the charge was true, but that the defendant acted *bonâ fide* in making it. For this purpose I think the evidence admissible. I will make a note of the objection: but you will distinctly understand to what extent I admit the evidence.

Wilde, Serjt., and *Tomlinson*, for the plaintiff.

Andrews, Serjt., and *Follett*, for the defendant.

(a) *Stockley v. Clement*, 4 Bing. 162.

(b) *Melen v. Andrews*, sup. 540.

EVANS v. WHYLE.—p. 468.

In an action on a guarantee for the price of gold to be supplied to a working goldsmith in the course of his business, where the goldsmith had been in the habit of endorsing bills of exchange to the plaintiff, and obtaining from him their amount, partly in gold at the usual credit price, and partly in money deducting the usual discount: Held, that it was a question for the jury, whether these transactions were in substance a sale of the gold, or whether that was only colourable and the real transaction a mere discount of the bills.

ASSUMPSIT. The action was brought on a guarantee for the price of gold, to the extent of 50*l.*, to be supplied to E. Evans, a working goldsmith, in the course of his business. The present was a new trial: the proceedings in court after the former trial are stated in 5 Bing. 485.

On the present trial it appeared that some gold and silver had been supplied to E. Evans by the plaintiff on regular delivery orders. The whole amount of the gold so supplied exceeded 50*l.*; but it appeared that while the amount was below 50*l.* the plaintiff had refused to supply any more, unless Evans could procure further security; and that he had accordingly procured another guarantee from one Armstrong, and then the remainder of those orders were executed. After this, the plaintiff refused to supply goods on delivery orders to the full amount of the two guarantees; and the whole amount of the goods supplied on delivery orders had been paid, partly by Armstrong on his guarantee, and partly by a payment into Court of 4*l.* in the present action.

Besides these dealings, E. Evans was in the habit of bringing bills of exchange to the plaintiff, and obtaining gold on them. To these transactions the plaintiff fixed no limit of amount. The course of dealing was this. On all sales of gold, the ready money price is ascertained, and a shilling a month is added per ounce, if credit is given. On some occasions the bills brought by the defendant exactly corresponded with the amount of gold purchased: for instance, in one case the ready money price of gold was 4*l.* 7*s.* per ounce, and three ounces of gold were paid for by a bill for 13*l.* 10*s.*, at three months; 13*l.* 10*s.* being the price of three ounces at three months' credit. In other cases the amount of the bill exceeded that of the gold furnished: in those cases the gold was furnished at the credit price, taking the length of time that the bills had to run as the time of credit, and the difference was paid in cash, deducting the usual rate of discount on that amount. For instance, on the 6th of November, E. Evans brought a bill for 26*l.*, payable at three months: for this he received three ounces of gold at 13*l.* 10*s.*, the ready-money price being 4*l.* 7*s.* an ounce, and for the remaining 12*l.* 10*s.* he received 12*l.* 7*s.* in cash, the three shillings being deducted as discount at five per cent. on 12*l.* for a quarter of a year. In the instances proved, E. Evans endorsed the bills to the plaintiff. The proportions of gold and money had for the bills varied; but E. Evans said he was never allowed to have more than half in money. At the time of E. Evans's insolvency, the whole balance due to the plaintiff was 204*l.*

On this state of facts, it was contended on the part of the defendant, that he was not liable on his guarantee; for that the goods, except those furnished on the delivery orders, were furnished without reference to the guarantee, and not in the course of trade contemplated by it: that the transactions were in substance the discounting of bills brought by E. Evans, in which he was obliged to take gold in part payment of their amount, not *bonâ fide* purchases of gold for the purposes of his trade.

For the plaintiff it was said, that as far as the gold went the sales were regular, and not the less so because there were mixed with them transactions in the nature of discount. Certainly, if the whole transactions were in substance discounts only, the defendant would not be liable on this guarantee; but that is not the case: the goods are sold on the usual terms of credit, the price being increased according to the length of credit in the usual way, which exceeds the rate of discount: they are therefore good sales as far as the amount of the gold goes; and it is only to this extent that the plaintiff seeks to charge the defendant.

TINDAL, C. J., in summing up to the jury said, The defendant is liable for gold supplied to E. Evans on sale in the course of his trade, and for no other. The goods supplied on delivery orders are paid for by Armstrong and by the 4*l*. paid into court: the only question is as to the rest; and it is a question of fact for you, Whether the delivery of the gold on these bills was indeed a sale of the gold, or only a mode of payment on the discount of the bills. One circumstance much relied on to show the latter, when the case was discussed in the Common Pleas, was that E. Evans did not endorse the bills; but that appears in the instances shown to us to have been a mistake. The question is for you: if you think the transactions to have been in substance sales, your verdict must be for the plaintiff. Verdict for the plaintiff, damages 46*l*.

Taddy, Serjt., and *Comyn*, for the plaintiff.

Jones, Serjt., and *Payne*, for the defendant.

TULL v. PARLETT.—p. 472.

Where a deed purported to be made "in consideration of esteem for A. T., and for divers other good considerations," evidence is admissible that it was made in consideration of an intended marriage with A. T. And it is admissible evidence of this fact, that the settlor (the future husband) instructed his solicitor to prepare the deed as a marriage-settlement. And that after the deed was executed, and before the marriage, he spoke of it as such.

ASSUMPSIT by the vendor against the vendee of real property.

The defendant refused to complete his purchase on the ground that the plaintiff could not make a good title.

The plaintiff took the estate under a deed, whereby the conveying party, "in consideration of his esteem for A. Tull (the daughter of the plaintiff), and for divers other good considerations," conveyed the estate to the plaintiff in trust for her daughter, independently of any husband, &c. One objection relied on was that this appeared to be a conveyance without consideration, and so gave no title in equity.

Jones, Serjt., for the plaintiff, proposed to show that the deed was made as a settlement on A. Tull, in consideration of an intended marriage between her and the conveying party, which took place two or three months afterwards: and he tendered as evidence of this the declarations of the conveying party, made after the deed was executed and before the marriage took place, that he conveyed this property as a settlement, on his intended wife; and also the instructions given by him to his solicitor, desiring him to prepare the deed as a marriage-settlement.

F. Kelly for the defendant objected to the evidence. Parol testimony is inadmissible to vary a deed: and this evidence, at all events, cannot be received, for it does not accompany the transaction.

TINDAL, C. J. I think I ought to receive the evidence. The consideration suggested is not inconsistent with the deed, which refers to "other good considerations" besides that expressed: and if evidence of such a consideration is receivable, I do not see what circumstances could be shown that would more directly tend to prove it. Verdict for the defendant.

Jones, Serjt., and *Thesiger*, for the plaintiff.

F. Kelly for the defendant.

See sup. 528, *Fellows v. Williamson*, and 542, *Vacher v. Cocks*.

ANGUS v. SMITH.—p. 473.

In order to discredit a witness by proof of a contradictory statement it is not enough to ask him generally whether he has ever made such a statement, but particulars must be specified to him.

ASSUMPSIT for not accounting and for money had and received.

The plaintiff's case was proved by one witness, her son, who on cross-examination denied that he had ever said he was in partnership with the defendant. The case for the defendant was, that he was accountable to the witness only, as a partner, and not to the plaintiff.

Wilde, Serjt., for the defendant proposed to ask a witness, whether on a particular occasion the plaintiff's witness had told him that he was in partnership with the defendant.

This was objected to on the part of the plaintiff, on the ground that her witness had not been questioned as to the particular person or conversation with respect to which it was proposed to contradict him.

TINDAL, C. J. As far as the contradiction of the witness of the plaintiff is concerned, I am clearly of opinion that the conversation proposed is not admissible in evidence. I understood the rule to be, that before you can contradict a witness by showing he has at some other time said something inconsistent with his present evidence, you must ask him as to the time, place, and person involved in the supposed contradiction. It is not enough to ask him the general question, whether he has ever said so and so, because it may frequently happen that, upon the general question, he may not remember having so said; whereas, when his attention is challenged to particular circumstances and occasions, he may recollect and explain what he has formerly said. I think, as far as my memory serves, the rule was so laid down to this extent in the Queen's case. I will allow the plaintiff's witness to be recalled and asked the particular question.

Verdict for the plaintiff.

Andrews, Serjt., and *Hutchinson* for the plaintiff.

Wilde, Serjt., and *Erle* for the defendant.

See 1 Phill. Ev. 292, 5th edition; and The Queen's Case, 2 Brod. & Bingh. 299. That decision established the principle, that it was necessary to remind the witness of the conversation, but it does not appear from the report to have laid down any rule as to the manner or degree in which it ought to be suggested to him; and the question there put to the Judges assumed that the witness had not been at all interrogated with respect to the declaration supposed to have been made by him. The general practice however since that decision has been in conformity with the rule adopted in the principal case.

GRANGER v. DENT.—p. 475.

Proviso in a charter-party, that if a ship do not arrive at her port of loading on or before, &c., unless prevented by stress of weather or other unavoidable impediment, the freighter should not be obliged to ship a cargo: Held, that if ordinary diligence were used in the voyage to reach the port of loading, the owners are within the exception of the proviso, though the ship is delayed till after the stipulated time by causes which extraordinary exertion might have counteracted.

COVENANT. The declaration stated that by a charter-party of affreightment dated the 22d of March, 1827, it was witnessed that the plaintiff had granted and let to freight to the defendant the ship *Alacrity*, then lying in the London docks, bound on a voyage to Sydney in New South Wales, upon the terms stated in the declaration, among which were the following: the plaintiff covenanted that the ship should depart on or before the 25th day of April then next, and proceed directly, wind and weather permitting, to Sydney in New South Wales, where having discharged the cargo that should have been shipped on board of her in the port of London, the master should proceed with the vessel to such port or ports, place or places, on the coast of Malabar, south of Bombay, in the

possession of the English East India Company, as should be directed by the freighter, and being arrived at such port, the plaintiff should at his own costs make the ship tight, &c., and take on board from the said defendant a cargo of pepper or other lawful goods, and proceed to the port of London. The declaration then stated a covenant by the defendant to ship a cargo of 800 tons of pepper, &c., and to pay freight for the same. It then averred that the ship sailed from London and proceeded to Sydney in New South Wales, where having discharged the cargo which had been shipped in London, the master proceeded with the vessel to Tilicherry, being a port on the coast of Malabar, to which the master had been directed by the freighter, and the plaintiff caused the vessel at his own costs to be made tight, &c., and gave notice to the defendant; the declaration concluded with stating a breach of the covenant to ship a cargo.

The defendant in his plea set out the charter-party upon *oyer*, which contained a *proviso* in these words, "provided always, and it is expressly agreed by and between the parties to these presents, and it is their true intent and meaning, that in case the said vessel shall not be arrived at the first intended port of loading on the coast of Malabar and be ready to load the said cargo on or before the 28th day of November, 1827 (unless she shall have been prevented by stress of weather or other unavoidable impediment), then and in such case it shall be at the option of the correspondents, factors or agents of the said freighter either to load or not to load the said vessel with the said cargo for London." The plea then stated that the said vessel, although not prevented by stress of weather or other unavoidable impediment, had not arrived at the first intended port of loading on the coast of Malabar, and was not ready to load the said cargo in the said charter-party in that behalf mentioned, on or before the said 28th day of November, 1827, but on the contrary thereof, arrived at such first intended port of loading long after the said 28th day of November, to wit, on the 20th of January, 1828, and not before; and that the defendant's correspondents had exercised their option not to load the cargo, &c.

The replication stated that the said vessel was prevented by stress of weather and other unavoidable impediments from arriving at the said first intended port of loading on the coast of Malabar, on or before the 28th day of November, 1827; on which issue was joined.

At the trial, the following facts were proved or admitted. The *Alacrity* left the London Docks on the 22d of April, 1827, and having been detained in the river by contrary winds departed from Gravesend on the 29th, in tow of two steamboats. She afterwards put into Rio de Janeiro, in consequence of her stock of water having been diminished by leakage, and into Simond's Bay to repair damage done by stormy weather to her rudder. She then proceeded to Sydney, where she was thirty days delivering her cargo, and having sailed for Tilicherry, arrived there on the 20th of January, 1828, when the defendant refused to provide a cargo, having engaged freight for his goods by other vessels. It appeared that the time employed at Sydney in unloading the cargo was not longer than was usual, and that if unloaded by the ship's boats and crew, which was the ordinary course there, it could not be done sooner; but that if more boats and men had been hired, by which some additional expense would be incurred, she might have completed her discharge in much less time.

TINDAL, C. J., in charging the jury, having intimated an opinion that ordinary despatch was all that the captain was bound to use in his outward voyage,

Taddy, Serjt., for the defendant, submitted that if by extraordinary exertion or expense, provided it were not unreasonable, the delay might have been prevented, it could not be said to have been occasioned by unavoidable impediment. Several days might have been saved in the river by procuring a steamboat at first, instead of waiting for the wind, and nearly a month at Sydney by engaging additional hands and boats to discharge the cargo.

TINDAL, C. J. I am obliged to my learned brother for stating his view of this case: my opinion is, that the captain was bound only to use ordinary diligence, and if he used those means of despatch which are usual in such a voyage he was engaged in, he may in the sense of his charter-party be considered as

prevented by unavoidable impediment from arriving earlier, though he might by extraordinary efforts have been able to do so.

His Lordship then directed the jury that if they were of opinion that ordinary diligence had been used, and that the arrival of the vessel had been delayed by impediments not to be overcome without unusual exertion, they should find for the plaintiff.

Verdict for the defendant.

Wilde and *Bompas*, Serjts., and *Lloyd*, for the plaintiff.

Taddy, Serjt., and *Maule*, for the defendant.

See sup. 526, *Simpson v. Henderson*.

SITTINGS AFTER HILARY TERM, IN K. B.

11 GEO. IV.—1830.

OBARD and Another, Assignees of BLOFELD, a Bankrupt, v. BETHAM. p. 483.

In an action by the drawer against the acceptor of bills of exchange, given for goods supplied, which were to be "of good quality and moderate price," and were estimated at about 400*l.*, and the bills given for that amount, it is no defence that the goods turned out to be worth much less than the estimated price, and that the acceptor has paid more than the real value of the goods on the bills.

It is *prima facie* evidence that a promissory note was in existence before an act of bankruptcy, that it is proved to have been in existence before the docket is struck, and bears date on the face of it before the act of bankruptcy.

ASSUMPSIT by the assignees of the drawer of bills of exchange against the acceptor.

The action was brought to recover the amount of one bill of exchange which continued in the hands of the drawer at his bankruptcy; and also the amount of a dividend paid by the assignees, upon another bill, drawn by the bankrupt and accepted by the defendant, and proved under the commission by the holder.

The defence set up was, that these and other bills had been given by the defendant, for goods supplied to him to take out on a voyage. The goods were not sold at any fixed price, but the contract for them expressed that they were to be "of good quality and moderate price," and estimated them at about 400*l.* The defendant accepted bills to the full amount mentioned in the contract. The goods were packed up by the bankrupt, and delivered on board ship, without the defendant's ever seeing them. The goods sold for only about 250*l.*, and the defendant had paid more than this sum on the bills of exchange given for the goods.

The *Attorney-General* for the defendant stated these circumstances, and said that they furnished an answer to the action. The plaintiffs can maintain no action which Blofeld could not; and he could maintain none, being overpaid for the goods already, and therefore not entitled to proceed on the remaining bills.

F. Pollock for the plaintiffs said, that the evidence opened could not be given as an answer to this action. The cases of *Morgan v. Richardson*, 1 Campb. 40 n. and *Tye v. Gwynne*, 2 Campb. 346, decided this point, and they have been acted on ever since.

The *Attorney-General*. The present case is distinguishable from those cited. The contract here contains an express warranty that the goods shall be "of good quality and moderate price," and the price is not fixed by the contract, so that the bills of exchange were given before the amount was ascertained between the parties. Suppose only part of the goods contracted for had been delivered, and

bills to that extent paid, it would be very unjust to compel the payment of the remaining bills, when the defendant had never received the value for which they were given; and there is no substantial difference between that case and the present. In *Fleming v. Simpson*, 1 Campb. 40 n. it was considered that where the goods delivered were fraudulently inferior to the terms of the contract, a party to the fraud could not recover on the bill; and the facts of this case may induce the jury to find a fraud. But, without that, it is fully established, that in an action for the goods the bankrupt would be unable to recover more than their worth; and under the circumstances of this case, at least, he ought not to be allowed to do so on the bills.

Lord TENTERDEN, C. J. The assignees certainly cannot recover in this action, unless the bankrupt would have been entitled to receive payment on the bills. But the cases cited for the plaintiffs have completely established the distinction between an action for the price of the goods, and an action on the security given for them. In the former, the value only can be recovered; in the latter, I take it to have been settled by those cases, and acted upon ever since as law, that the party holding bills given for the price of goods supplied can recover upon them, unless there has been a total failure of consideration. If the consideration fails partially, as by the inferiority of the article furnished to that ordered, the buyer must seek his remedy by a cross action. The warranty relied on in this case makes no difference. In *Morgan v. Richardson*, the hams bought turned out unmarketable. That was just as much a breach of warranty as there is in the present case; for every man selling a commodity warrants it to be of merchantable quality: no purchaser buys except upon that understanding.(a)

Verdict for the plaintiff for the whole amount.

Notice had been given to dispute the bankruptcy, petitioning creditor's debt, &c. These sufficiently appeared on the proceedings under the commission; but the plaintiffs, to enable them to recover the amount of the dividend paid by them (for which part of their demand the bankrupt could not maintain an action, so as to bring that part of the case within the protection of the 6 G. 4, c. 16, s. 92), gave parol evidence of them.(b)

The petitioning creditor's debt arose on a promissory note made by the bankrupt to his sister, who was the petitioning creditor. It bore date in 1822, some years before the bankruptcy; but no other evidence was given of its existence until a few days before the docket was struck, at which time the solicitor to the commission said it was put into his hands.

The *Attorney-General*, for the defendant, said that this proof was insufficient, as not showing the note to have existed at the time of the act of bankruptcy. It is perfectly possible that the note may have been given just before the commission, for the express purpose of founding it.

F. Pollock referred to *Taylor v. Kinloch*, 1 Stark. N. P. C. 175, as showing that the date was at least *prima facie* evidence. In that case the same argument was used against its admission.

The *Attorney-General*. The inclination of Lord Ellenborough's opinion in that case, seemed to be rather against the admissibility of the evidence, though he received it as a matter of convenience.

Lord TENTERDEN, C. J. There is proof here of the existence of the note before the docket was struck, and I do not think it has been usual to require more. At all events I shall deal with the question, as to the evidence furnished by the date of the note itself, as Lord Ellenborough did in the case cited, and treat it at present as evidence of the note's existence then. I will save the point for the defendant, if it is wished.

Some slight confirmatory evidence was afterwards given, and the objection was not further pressed.(c)

F. Pollock and *Archbold* for the plaintiffs.

Scarlett, A. G., and *Justice* for the defendant.

(a) *Gray v. Cox*, 4 B. & C. 108; *Laing v. Fidgeon*, 6 Taunt. 108; *Jones v. Bright*, 5 Bing. 533
(b) See *Jones v. Fort*, sup. 506.

(c) See *Cowie v. Harris*, sup. 490.

SHERMAN v. BENNETT.—p. 489.

A sailor serving under articles providing for a forfeiture of his wages in case of breach of any of his engagements, among which is that of serving faithfully during the voyage, can recover nothing if he is left ashore in the course of it owing to his own fault in being absent, though he had no intention of deserting.

He is left on shore by his own fault, if he is so in consequence of going away, after being forbidden by the captain, though he subsequently obtains the leave of an inferior officer.

This defence may be proved on a plea of nil debet.

DEBT. The plaintiff was a sailor employed in the South Sea whale fishery, and brought this action to recover his share of the proceeds of a voyage according to the stipulations of an agreement under seal, under which he served.

The declaration set out the articles of agreement, which contained the usual engagements that the sailors should obey orders, should not absent themselves without leave, &c., and the common proviso, that on the breach of any of their engagements, or failure to perform the articles, they should forfeit their share of the proceeds; and it proceeded to aver the performance by the plaintiff of his duties under the articles, until the captain improperly left and deserted the plaintiff on the island of Bravo, and thereby prevented him from completing his service.

The defendant pleaded nil debet, and three other pleas; the first stating in detail the circumstances presently mentioned, and treating them as a desertion by the plaintiff; and two others stating them more generally.

It appeared that on the arrival of the ship off Bravo, one of the Cape de Verd Islands, she lay to several miles off the shore, and the captain, one of the mates, the plaintiff, and several sailors, went ashore: the captain going to visit the governor, and obtain leave to trade on the island. The captain having left the rest of the party on the shore and gone to the governor, evidence was given on the part of the plaintiff, that the day being very hot, and the boat's crew having left the ship without breakfast, he and another man obtained leave from the mate, who was left in command, to go to the town, at some miles distance, to get provisions; that on their return they found the boat gone; and they were unable to get any conveyance to the ship, although they attempted to do so; and that finally the ship sailed without them.

On the part of the defendant evidence was given that the captain, when he went to the governor's, gave express orders that none of the crew should leave the beach till he returned; that he desired them to get refreshments there, which they had the opportunity of doing; that on his return, when he found the two men absent, he waited for them as long as he could, so as to be able to return to his ship while it was light enough to see it; that the next day was so foggy that he could not see the island, and was therefore unable to make sail for it, and take them off; that he waited the whole of that day in hope of the fog clearing, but that, the weather being calm, and there being no anchorage, he was carried a long way from the island by currents; and that the men were unable to join the ship, or he to take them on board. Some evidence was also given to show that the plaintiff went to the town for the purposes of barter, and not for provisions.

On this evidence *Gurney* contended that the defendant was entitled to a verdict. There is no reason certainly to suppose that the plaintiff intended to desert the ship, but this is immaterial; for if he improperly absented himself, and this was the cause of his being left on shore, he has forfeited his wages. The leave said to have been given him to go to town by the mate is immaterial, for the captain had given previous orders to the contrary, and the plaintiff, who knew of these orders, was not justified in disobeying them by any permission which he might get from an inferior officer.

Campbell for the plaintiff, said that the only question was whether Sherman had deserted the ship; the defence is so stated in all the pleas, and the defendant must succeed or fail on that issue. It is admitted that he had no intention of

doing so; and *Sigard v. Roberts*, 3 Esp. 71, clearly shows that the facts do not amount to a desertion. Even if the evidence of the orders given by the captain that they should not quit the beach is correct, it will not affect the case, for they are only bound to obey his reasonable and lawful orders; and these, under the circumstances of the case, were not of that character.

LORD TENTERDEN, C. J. Certainly there is no desertion by the plaintiff in this case; but I do not think that this is the real question in this cause. By the terms of the ship's articles the plaintiff is to receive a share of the produce on performing the voyage, and serving faithfully during its continuance. He did not perform the voyage; to entitle him then to recover, it lies on him to show himself prevented by the fault of the master. For this purpose he alleges that the master left him on shore without reasonable cause, and this he must prove upon the plea of nil debet, so that the question is not confined by the special pleas to the fact of desertion, even if the special pleas by themselves would so confine it, which I think one of them would not. If however the account given by the plaintiff's witnesses is correct, he will be entitled to a verdict; for, according to them, there would be no reasonable cause for abandoning him. If, on the other hand, you believe the account given on the part of the defendant, your verdict should pass for him; for, according to that, the plaintiff is left behind by his own fault, having gone away in violation of the captain's orders; a disobedience not excused by the alleged permission of the mate, for the mate in that case had no authority to dispense with the order. In that case, therefore, although there was no intention to desert, the plaintiff improperly and disobediently went away; and it was in consequence of this that he was left behind, not having returned to the shore in time to go on board the boat: he was left therefore by his own fault; and not having earned his wages, he cannot recover them.

Verdict for the defendant.

Campbell and *Comyn* for the plaintiff.

Gurney and *Platt* for the defendant.

CURTIS and Others, Assignees of ELLISON, a Bankrupt, v. WHEELER and Another.—p. 493.

[S. C. 4 Carr. & P. 196.—19 E. C. L. Reports.]

In replevin, if there be any affirmative issue on the plaintiff, he is entitled to begin. A tenant from year to year, underletting from year to year, has a reversion which entitles him to distrain.

REPLEVIN. Avowry by Wheeler, and cognisance by the other defendant, for rent arrear, on a tenancy by the bankrupt to Wheeler; with several other avowries and cognisances varying in the statement of the tenancy.

Pleas in bar to each avowry; 1. non tenuit; 2. no rent in arrear; 3. stating a demise from Ellison to the defendant Wheeler from year to year, of premises, including those on which the distress was taken, at a larger rent than that distrained for; a demise back from Wheeler to Ellison, from year to year, of two rooms, part of the same premises, being those on which the distress was taken, at a lower rent; an agreement to set off one rent against the other; and an averment that more rent was due at the time of the distress from Wheeler to Ellison than from Ellison to Wheeler.

The replication to this plea in bar traversed the agreement to set one rent against the other, and also denied that more rent was due from Wheeler than from Ellison.

The *Attorney-General* for the defendants claimed to begin. In replevin both parties are equally actors; the plaintiff therefore has no privilege, and the right of beginning will be with the party on whom the affirmative substantially lies.

Now here it does so on the defendant. There is indeed an issue on the replication to the third plea which in form seems to require affirmative proof by the plaintiff: but it does not in reality do so, for all those matters might be proved under the issue of *riens en arriere*, on which the defendant would clearly have a right to begin. This does not therefore differ in substance from the common case in *replevin*, where the defendant has to begin, because he has to make out the whole case, which all arises on the *avowries*. It would be of great mischief to establish a rule which would allow a plaintiff in such a case to put upon the record a plea of false and imaginary circumstances, and thus to get the right of beginning.

LORD TENTERDEN, C. J. I am not sure that the matter of this plea in bar could have been given in evidence on the plea that no rent was in arrear. At all events, as pleaded, it presents an issue the affirmative of which is on the plaintiff, and on proof of which he would be entitled to a verdict. I can make no distinction between *replevin* and other forms of action: the principles applicable to all are the same. The consequence is that the plaintiff is entitled to begin, as there is an affirmative issue upon him.

The plaintiff began accordingly.

In the course of the cause, *Denman* suggested that the distress could not be supported, as the defendant had no reversion, holding only from year to year under *Ellison*, and having let to him from year to year also.

LORD TENTERDEN, C. J., held that there was a sufficient reversion.

Verdict for the defendants.

Denman and *Chitty* for the plaintiffs.

Scarlett, A. G., and *Carrington*, for the defendants.

WILKINSON v. HOWELL.—p. 495.

An action for a malicious arrest cannot be maintained where the former cause was terminated by a *stet processus* by the consent of the parties.

CASE for a malicious arrest.

The declaration stated that the original action was terminated by a *stet processus*.

The defendant in that action had obtained a rule calling on the plaintiff to show cause why there should not be judgment as in case of a nonsuit; and, on showing cause, it appearing that the then plaintiff was a bankrupt, the Court, with the consent of the parties, ordered a *stet processus*.

On these facts the *Attorney-General*, for the defendant, submitted that the *stet processus*, being by consent, barred this action; otherwise there would be a fraud on the Court, who would not have allowed it unless on terms of waiving all further proceedings.

It was contended for the plaintiff, that it was sufficient to show that the action was terminated by a *stet processus*, and that the rest of the evidence would prove the proceeding malicious, and without probable cause.

LORD TENTERDEN, C. J. The general rule is, that a party cannot sue for a malicious arrest or prosecution, without showing in his declaration how the proceeding complained of was terminated. That is the form in which the rule is generally expressed; and I think that rule involves this principle, that the termination must be such as to furnish *prima facie* evidence that the action was without foundation. I think this mode of termination does not furnish any evidence that the action was without probable cause. If this should be allowed, the defendant would be deceived by the consent; as, without that, he would certainly have gone on with the action, and might have shown a foundation for it. I have no doubt about it.

Nonsuit.

Brougham, F. Pollock, and Platt, for the plaintiff.
Scarlett, A. G., and Follett, for the defendant.

In the following Term *Brougham* moved for a rule nisi to set aside this non-suit; but the other learned Judges concurred with his Lordship, and the Court refused the rule.

WARD and Another, Assignees of PRATT, a Bankrupt, v. CLARKE and Another.—p. 497.

Assignees of a bankrupt cannot recover in trover goods delivered upon a transaction which the bankrupt himself could not impeach, unless the delivery is subsequent to an act of bankruptcy taking place *after the petitioning creditor's debt has accrued.*

Where the bankrupt, after a secret act of bankruptcy, bought on credit and sold for ready money, at unduly low prices, the purchasers were held not protected by 6 G. 4, c. 16, s. 82, unless the purchase was in the *usual course of business.*

And if the purchaser knew the price to be greatly under the value of the commodity, it is not within the protection of the statute.

SITTINGS AFTER HILARY TERM, IN C. P.

11 GEO. IV.—1830.

TAYLOR and Another v. WELSFORD and Another.—p. 503.

A certificate obtained after 6 G. 4, c. 16, on a commission of bankruptcy issued before that statute, is proved by the production of the certificate duly allowed.

SITTINGS AFTER EASTER TERM, IN K. B.

11 GEO. IV.—1830.

HOUGH v. MARCHANT and EDWARDS.—p. 510.

The person giving another in charge for a felony, and assisting a constable in the arrest, is not entitled to an acquittal on the general issue in trespass brought against him together with the constable.

TRESPASS and false imprisonment.

The defendant Marchant was a constable of the city of London, and had arrested the plaintiff upon a charge of felony made by the defendant Edwards in the city of London. He was assisted in the arrest by the defendant Edwards.

Upon this being shown in evidence, *Patteson*, who appeared for the defendant Marchant, claimed an acquittal for him under 7 Jac. 1, c. 5; and on this being conceded, he suggested for Edwards, who was undefended, that as he was present at the arrest, and aided the constable, he might be protected too.

Lord TENTERDEN, C. J., said, it certainly furnished no defence for Edwards, and left the case to the jury, who found a verdict against him for
20*l.* damages.

Scarlett, A. G., and Platt for the plaintiff.
Patteson for the defendant Marchant.

RENTERIA *v.* BUDING and Another.—p. 511.

An endorsee of a Spanish bill of lading to whom the goods have been delivered under it, is liable in assumpsit for the freight, although the bill of lading is for delivery to the consignee, without saying "or their assigns," such bills of lading appearing by evidence to be usually passed by endorsement.

ASSUMPSIT for freight, work and labour, and the money counts.

The action was brought to recover 192*l.* 1*s.* 4*d.* for freight of a cargo of wheat shipped from Deva in Spain to London, and delivered to the defendants under the bill of lading, which had been endorsed by O'Brien, the consignee named in it, immediately on its arrival in London. The following is a translation of the bill of lading, which was in Spanish:—

"I Jose Antonio Renteria, of Vernreo in Biscay, master of the ship called St. Jose, now lying at anchor in the port of Deva, in order, when the wind shall be favourable, to prosecute the present voyage to the port of London, acknowledge to have received and loaded on board my said ship, and under the deck thereof from you, Mr. Bernardo Echaluze, 1826 fanegas Guipuzcoa measure or 1584 fanegas of Alaya wheat, each fanega weighing 86 pounds of 17 ounces per pound; 91 fanegas of Blanquillo, well selected, the fanega weighing 89 and one-quarter pounds of 17 ounces per pound; and 151 fanegas, also selected, weighing 88 and three-quarters pounds, the whole well-conditioned and marked and numbered as per margin, and which I promise and bind myself, please God to grant me a safe voyage with my said vessel to the aforesaid port, to deliver for you and in your name to Messrs. Andrew O'Brien and Loughnan on being paid freight ten rials vellon for each fanega, and besides 10 per cent. for primage, with average accustomed; and to the performance hereof I bind my person and property and my said ship, her freight and appurtenances, and the best value thereof. In witness whereof I have signed three bills of lading all of the same tenor, signed by me or my clerk, on one of which being fulfilled the others to remain null and void. Done at Deva, the 14th February, 1829."

There was no charter-party, and the plaintiff claimed the freight under the authority of *Cock v. Taylor*, 13 East, 399; *Dougal v. Kemble*, 3 Bing. 388.

Brougham for the defendants attempted to distinguish this case, on the ground that the bill of lading was not assignable by endorsement, the usual words "or their assigns" being omitted.

The plaintiff however having proved by a witness acquainted with the Spanish trade, that bills of lading from Spain were frequently in the same form, and were nevertheless treated as assignable by endorsement,

Lord TENTERDEN, C. J., after referring to the *Treatise on Shipping*, p. 286, fifth edit., and reading, "For if a person accepts anything which he knows to be subject to a duty or charge, it is natural to conclude he means to take the duty or charge on himself, and the law may very well imply a promise to perform what he so takes upon himself," said, This seems to me to be the correct principle, and the omission of the words "or their assigns" makes no difference.

Verdict for the plaintiff.

Scarlett, A. G., and Maule, for the plaintiff.
Brougham and Wightman, for the defendant.

SITTINGS AFTER EASTER TERM, IN C. P.

11 GEO. IV. 1830.

GEORGE v. SURREY.—p. 516.

An instrument executed by mark may be proved from inspection by a person who has seen the party so execute instruments.

ASSUMPSIT by the endorsee against the acceptor of a bill of exchange drawn by Ann Moore, to her order, and endorsed by her to plaintiff.

Ann Moore drew the bill by her mark, and it was endorsed by mark; the writing "Ann Moore her mark," on the endorsement, being in the plaintiff's hand. A witness was called to prove the endorsement, who stated he had frequently seen Ann Moore make her mark, and so sign instruments, and he pointed out some peculiarity.

TINDAL, C. J., after some hesitation, admitted the evidence as sufficient, and the plaintiff had a verdict.

The cause was undefended.

Wilde, Serjt., and *Hill*, for the plaintiff.

SITTINGS AFTER TRINITY TERM, IN K. B.

1 W. IV.—1830.

WOODFORD v. WHITELEY, Gent., One, &c.—p. 517.

An acceptance of the debtor taken as payment by the creditor must be taken as a discharge if not proved to be destroyed, although it is proved to be lost, and although the creditor offer to indemnify by rule against any claim on the bill.

ASSUMPSIT by the endorsee against the drawer of a bill of exchange for 30*l*. After the bill became due the defendant had paid 15*l*. by his own acceptance of the bill to that amount. This bill was proved to have been lost, and the plaintiff offered by rule to indemnify the defendant against any demand on it. On this being refused by the defendant's counsel,

PARKE, J., told the jury that they must deduct this bill from the amount of their verdict; that, unless it was produced or shown to be destroyed, the defendant would still continue liable upon it, and it might at any time be produced against him.

Verdict for plaintiff 16*l*.(a)

Campbell and *Archbold* for plaintiff.

Platt for defendant.

(a) See *Hansard v. Robinson*, 7 B. & C. 90.

BUCKER, Assignee of SNELL, a Bankrupt, v. BOOTH and COPELAND, Sheriff of Middlesex.—p. 518.

Where the goods of a bankrupt taken in execution are discharged by payment of the sum to be levied by a creditor after a docket struck, the assignees subsequently chosen, cannot, by repaying that sum, maintain an action for money had and received against the sheriff.

ASSUMPSIT for money had and received to the use of the plaintiff as assignee and on an account stated.

Plea, the general issue, with notice of disputing the trading, petitioning creditor's debt, and act of bankruptcy.

The commission of bankruptcy was dated the 30th of September, 1829, and the defendants issued their warrant under a fi. fa. at the suit of Brooking and Surr against Snell the bankrupt, on the 4th September, and the officer entered and kept possession irregularly until the 25th, the bankrupt having endeavoured to raise money to prevent a sale. On that day, in consequence of threats to sell, T. S. Snell, the brother of the bankrupt, paid 26*l.* 15*s.*, the sum for which the execution was levied: at the same time serving the following letter on the sheriff's officer:—

“25th Sept. 1825.

“Brooking and Another v. Snell.

“Take notice, that a docket has been struck against Mr. Joseph William Snell, the defendant in this action, and that the sum of 26*l.* 15*s.*, now paid by me to you to discharge the execution levied by you, is paid under protest; and I hereby give you further notice to retain the same sum in your hands until further notice.

THOS. SNELL,

“Creditor of the estate of J. W. Snell.”

This money was the money of Thomas Snell, and paid with a view to prevent the sale, which, it was contended on other grounds, would have been illegal as against the assignees. After the appointment of assignees, they paid Mr. Thomas Snell the money and brought this action.

Evidence was also given on cross-examination of the plaintiff's witnesses, impeaching the act of bankruptcy; the trading was admitted, and the petitioning creditor's debt completely proved.

Upon its being objected that the action was misconceived,

The *Attorney-General* contended, that the subsequent consent and ratification of the assignees enabled them to maintain the action; that it would be mischievous if the creditors were obliged to submit to an illegal waste of the bankrupt's goods by a forced sale, and that the assent of a party to an act for his benefit would be a presumption of law; and that the relation of the title of the assignees operated in this case, and made this act done for them and for their benefit equivalent to an act done by themselves. If they cannot maintain the action, the creditor certainly cannot, and in consequence no one can, and therefore there would be no remedy.

PARKE, J. I think that for this purpose there can be no relation of the title of the assignees. All the rights of the bankrupt become theirs by relation; but this is not the bankrupt's money, but that of a third person, and I am not aware that the maxim of *omnis rati habitio*, &c., has ever been carried so far as to give effect to acts done when ratifying parties did not exist; here there were no assignees existing at the time, and therefore there could be no prior command. It does not follow that the plaintiff can recover because Snell cannot. The plaintiff must be nonsuited.

Nonsuit.

Scarlett, A. G., and *Archbold* for the plaintiff.

Campbell and *Follett* for the defendants.

VAN WART v. WOOLLEY and Others.—p. 520.

A party employing another to present a bill for acceptance, is entitled to recover nominal damages against such agent, if he fails to present it, although no real damage whatever is occasioned by the neglect, the bill and costs having been paid by other persons liable on it.

ASSUMPSIT. This was a new trial in the case of *Van Wart v. Woolley*, reported in 3 B. & C. 439. The special case agreed to on the former trial was put in as evidence of all the facts up to that time.^(a)

Since the last trial, the plaintiff, in conformity with the decision of the Court in that case, proceeded in America against Irving & Co., from whom he received the bill of exchange in question; and recovered against them the full amount of the bill with interest. The plaintiff received the amount of the verdict and costs.

The *Attorney-General*, for the plaintiff, stated that, this cause being undisposed of, he now proceeded for nominal damages. The special damage assigned in the declaration is disproved, but without that there is a complete breach of contract stated in the declaration, and on that nominal damages must be given. This was the opinion of the Court on the former occasion. 3 B. & C. 448.

Campbell, for the defendants. At the time of the former decision it was very doubtful whether by the law, as understood in America, the plaintiff could maintain any action there against either Irving & Co. or the drawers of the bill. The Court however thought that he could do so, and that was the substantial point decided in that case. It has since been completely ascertained that Irving & Co., by the law of America, as well as of this country, continued liable on the bill, and Cranston & Co., the drawers, were so also. What then ought the plaintiff to have done? To have sued either of those parties. If he had done so immediately, he would have recovered; and he has actually done so, although after so long delay, and has recovered his full amount of debt, interest, and costs. There is therefore no injury. It is said that no special damage need be proved. That is true in many cases, for there is necessarily some damage in the contemplation of law: but here that is not the case; from the nature of the circumstances, no damage could accrue unless the plaintiff was precluded from recovering against the parties liable to him; and, instead of that, he has actually recovered.

LORD TENTERDEN, C. J. The opinion which I expressed in the former case, that the plaintiff was at all events entitled to nominal damages, was not my own opinion only, but that of the whole Court. I now entertain the same opinion. Every man employing another to present a bill for him is entitled to notice from that other of its dishonour. If he does not receive that notice, he suffers damage, though he may ultimately receive the amount of the bill: and he is therefore entitled to a verdict. Verdict for the plaintiff, damages 1s.

Scarlett, A. G., and Pattenon for the plaintiff.

Campbell and Busby for the defendants.

(a) See *Van Wart v. Woolley*, R. & M. N. P. C. 4.

SHAW and Others, Assignees of BATLEY, a Bankrupt, v. HARVEY.—p. 526.

A commission of bankruptcy may be supported on a petitioning creditor's debt on a balance of accounts which continue running up to the commission and always against the bankrupt to the extent of 100l.; though payments have been made sufficient, if applied in the order of time, to discharge the particular balance actually due at the time of the act of bankruptcy. Persons trading abroad in such mode as to constitute a partnership here, may sue here as partners for consignments sent to this country, though they cannot sue at the place of trading by reason of the particular law of that country.

TROVER. Plea, the general issue, with notice to dispute the petitioning creditor's debt, trading, and act of bankruptcy.

The petitioning creditor was James Saumarez Dobree, partner of Richard James Dobree, trading at Rotterdam under the name and firm of Richard James Dobree, for a debt due to the firm.

The commission was dated 25th July, 1828. The act of bankruptcy proved was on the 28th March. The clerk of R. J. and J. S. Dobree, a Dutchman, was called to prove the debt. He stated that they carried on business at Rotterdam together, in such mode and terms as clearly to constitute a partnership according to the law of England. They were in the habit of dealing with the bankrupt, who lived at Norwich, and of consigning goods to, and drawing bills on him. On the 28th March, the balance due to the firm was 1600*l.*, and the dealings and account continued up to the commission. In the interval bills were drawn on the bankrupt, and paid by him, to the amount of 2100*l.*, but other bills were drawn and other demands accrued, always keeping a balance due to the firm to the extent of far more than 100*l.* No balance was struck at the time of the act of bankruptcy.

It was objected for the defendant, that the debt due at the time of the act of bankruptcy was satisfied at the time of the commission; that as the account continued running, and payments were made by the bankrupt generally, those payments, according to Clayton's case, 1 Merivale, 572, and Bodenham v. Purchas, 2 B. & A. 39, must be applied to discharge the debts according to the order of time, and therefore the balance due at the time of the act of bankruptcy was discharged, and the present balance was for demands accruing subsequent to the act of bankruptcy.

Lord TENTERDEN, C. J. It appears to me that if there was a petitioning creditor's debt at the time of the act of bankruptcy on which a commission might have issued, and there was a petitioning creditor's debt still existing at the time of the commission, it does not signify what happened in the interim as to the payment of the items of the first debt, the balance throughout continuing sufficient for a petitioning creditor's debt.

It was then proposed to show on the part of the defendant in answer to the proof of partnership, that R. J. and J. S. Dobree were not legally partners according to the law of Holland: that certain formalities in constituting a partnership, by writing, and registering the writing duly executed, were necessary; and that these formalities were not complied with: and a copy of the Code Napoleon, which was proved to be the law of Holland as to the Code de Commerce, was put in, and his lordship was referred to ss. 39, 41, 42, 43, of the Code de Commerce.

Lord TENTERDEN, C. J., after referring to the articles, said, This may be the governing law of Holland, but it will not prevent persons from suing here as partners. If they really are such they may maintain an action for goods sold and delivered here. These are merely municipal regulations, preventing, as it seems, their suing as partners where they are in force, but not affecting the general rights of the parties.

A verdict was then taken for the plaintiff subject to a reference as to the amount.

Scarlett, A. G., and Pattenon, for the plaintiff.

Gurney, F. Pollock, and F. Kelly, for the defendant.

HEMING and BAXTER, Gentlemen, two, &c. v. WILTON.—p. 529.

An action on an attorney's bill cannot be maintained for professional business against an attorney without delivering a signed bill previous to the action.

But an item for money lent may be separated from the professional items and be recovered.

SITTINGS AFTER TRINITY TERM, IN C. P.

1 Wm. IV.—1830.

GOSLING v. BIRNIE.—p. 531.

Proof of a conversation with the defendant in the cause, referring to the matters involved in it, taking place after the writ is sued out, will satisfy an undertaking to give material evidence in the county where the conversation took place.

TROVER for timber.

The timber was sold by Ross and Co. to the plaintiff; and regularly paid for by him. At the time of the sale it was lying at the defendant's wharf at Basingstoke in Hampshire, where also the sale took place. The payment was made in Middlesex. Ross and Co. gave an order to the defendant to deliver the timber to the plaintiff, on being paid a sum due to him for cartage, and the defendant accepted the order. This took place in Hampshire in November 1829.

On January 5, 1830, the plaintiff tendered to the defendant's agent in London the sum due to him for cartage and wharf charges, but the defendant refused to deliver the timber, saying, that it had been previously sold to a person of the name of Allam, and that the plaintiff had no property in it.

No tender had been made before January 5; but the plaintiff had demanded the goods in Hampshire before the 18th December, and no claim was made to retain them on account of a lien for cartage, &c.

The writ in the action was sued out on December 18th. The defendant had obtained an order to change the venue, which was discharged on the plaintiff's giving the usual undertaking to give material evidence in London.

Taddy, Serjt., for the defendants submitted that the plaintiff must be nonsuited, for not having complied with this undertaking. There is no evidence whatever in London, except the tender on January 5th, which is after the action brought. Either the tender was necessary or unnecessary: if unnecessary, it cannot be material evidence; if necessary, the action was brought too soon, for the cause of action was not complete when it was commenced.

TINDAL, C. J. The conduct of the parties up to the time of the trial is admissible in evidence. I cannot therefore exclude this evidence; and it certainly is material as explaining the prior detention of the timber by the defendant. The plaintiff would not be at liberty to show a new cause of action accruing after the writ sued out: but here he only explains what had taken place before, by the defendant's conduct after that date.

Verdict for the plaintiff, with leave to move on other points.

Wilde, Serjt., and *R. V. Richards*, for the plaintiff.

Taddy, Serjt., and *Starkie*, for the defendant.

PARREY v. DUNCAN and Others.—p. 533.

On an avowry of a distress as made under 11 G. 2, c. 1, on goods fraudulently removed, the defendants must prove that there was no sufficient distress left on the premises.

DOE on the demise of TUCKER v. TUCKER.—p. 536.

In ejectment by the heir at law, the defendant is not entitled to begin by admitting the heirship and seisin of the ancestor unless defeated by a conveyance made by the ancestor under which the defendant claims. To entitle the defendants to begin, the plaintiff's whole *prima facie* case must be admitted.

REPORTS OF CASES
ARGUED AND DETERMINED
IN THE
COURT OF KING'S BENCH.

By J. DOWLING,
Of the Middle Temple, Esq., and
A. RYLAND,
of Grays' Inn, Esq.

VOL. IX.

Containing Cases from Michaelmas Term, 1826, to Trinity Term,
1827.

CASES
ARGUED AND DETERMINED
IN THE
COURT OF KING'S BENCH,

IN
Michaelmas Term,

IN THE SEVENTH YEAR OF THE REIGN OF GEORGE IV.—1826.

GILLBANK'S Bail.—p. 6.

Time allowed to add and justify bail by Habeas Corpus, where one of the bail of whom notice had been given, was taken suddenly ill.

It is a general rule, that no additional time is allowed in bail by habeas corpus, if the bail do not come up pursuant to notice, or are rejected. In this case, however, one of the bail of whom notice had been given, had become suddenly ill, and was unable to attend. Upon an affidavit of this fact,

BAYLEY, J., allowed two days' time to add and justify another bail.

Chitty for the defendant.

SHILLITOE'S Bail.—p. 6.

Where time was applied for to send an affidavit of justification into the country, to amend a mistake in the jurat, the Court made the attorney pay the costs of the application.

In this case there being a mistake in the jurat as to the names of the bail by affidavit,

R. V. Richards applied for time to send the papers back into the country, to have the mistake rectified.

BAYLEY, J. Let it be so, but it must be at the expense of the attorney or his clerk. People will recollect, when they have to pay for their blunders.

Time given.

WINTER v. BARNES.—p. 18.

Process being returnable in Easter, plaintiff, in Trinity term, files common bail for defendant, and divers a declaration with notice to plead. In Trinity vacation, judgment is signed for want of plea:—Held, that defendant was not entitled to an imparlance until Michaelmas term, for this rule only applies where the defendant himself is properly in Court before the declaration is delivered.

LLOYD and Co. v. FRESHFIELD and Another.—p. 19.

Where a partner borrowed money on his own private account, and subsequently applied part of it to partnership purposes:—Held, that the lender could not sue the partnership for the money so borrowed.

ASSUMPSIT for money lent the defendants as co-partners. The first named defendant pleaded non assumpsit, on which issue was joined. The other defendant suffered judgment by default. At the trial before Abbott, C. J., at the London adjourned sittings after last term, it appeared in evidence that the money, for which the action was brought, had been lent by the plaintiffs to one of the defendants only. Two questions were raised at the trial; first, whether the money had been lent on the partnership credit, or only on the private credit of one of the partners for his own private purposes, with the plaintiffs' knowledge; and second, whether any portion of the money had found its way into the partnership funds, and had been applied to partnership purposes, so as to make the defendant Freshfield liable pro tanto. The jury found their verdict for the defendant.

Brougham now moved for a rule nisi for a new trial, on the ground that on the second point the verdict was against the evidence.

ABBOTT, C. J. Assuming that any part of this money found its way into the partnership funds, I by no means wish it to be understood, that if one partner borrows money on his own private credit, and afterwards applies it to the partnership uses, the lender of the money may, in consequence of such subsequent application, charge the partnership with the liability of the single partner in his private capacity. That is a doctrine to which I cannot yield; and which cannot, in my opinion, be supported in law.

BAYLEY, J., HOLROYD, J., and LITLEDALE, J., concurred in the propriety of the verdict. Rule refused.

JOHN DODDS and Others v. RICHARD EMBLETON.—p. 27.

The master of a vessel having on board a licensed pilot appointed by the Trinity-House of Newcastle-upon-Tyne, under the Local Act, 41 G. 3, c. 86, s. 6, is not entitled to the protection of the 55th section of the General Pilot Act, 6 G. 4, c. 125.

M'GILLIVRAY and Others, Assignees of INGLIS and Another, Bankrupts, v. SIMSON.—p. 85.

An agreement by a broker, that he will sell goods for his principal, and pay over the whole proceeds, without setting off a debt then due to him from his principal, is not binding upon the broker, so as to deprive him of his legal right of lien or set-off.

ASSUMPSIT. The declaration stated that the bankrupts, together with another person, since deceased, had carried on business with one Edward Ellice, under the firm of Inglis, Ellice & Co.; and that Ellice retired from the said partnership on the 30th of April, 1821, and the bankrupts and the now deceased partner then commenced business, under the firm of Inglis and Co.; that the sum of 1844*l.* 7*s.* 5*d.* was due to the defendant from the firm of Inglis, Ellice and Co., and a further sum of 418*l.* 4*s.* 2*d.* from the firm of Inglis and Co.; that the firm of Inglis and Co., since the death of the deceased partner, was possessed of four bills of lading, whereby a quantity of timber was delivered to them; that at the time of making the promise thereafter mentioned, the firm of Inglis and Co. was insolvent, of which defendant had notice; that in consideration that

Inglis and Co. would employ defendant as broker, to sell the timber upon commission, and would endorse and deliver the bills of lading to him, defendant undertook to account for, and pay over, the proceeds of the sales, without deducting therefrom the sums of money, or either of them, so due to him as aforesaid. Averment of performance, on the part of the bankrupts, before their bankruptcy, and that the timber was sold for 9,000*l.* besides the expenses and charges upon the sale; but that defendant did not, nor would account for, and pay over the proceeds, without deducting the two sums so due to him as aforesaid; but, on the contrary, rendered an account, in which he did deduct the whole of those two sums, and refused to render any other account. Plea, non assumpsit, with notice of set-off. Issue thereon. At the trial before Abbott, C. J., at the London adjourned sittings after last term, the case was this. The plaintiffs were the assignees of Inglis and Co. The partnership of Inglis, Ellice and Co. was dissolved on the 30th of April, 1831, that firm then being indebted to the defendant upwards of 1,800*l.* After the retirement of Mr. Ellice, who was still living, the firm of Inglis and Co. became indebted to the defendant about 400*l.* On the death of Mr. John Inglis, a partner in both the firms, on the 7th of August, 1822, it was found that the house was insolvent, and the creditors, among whom was the defendant, were called together and informed of it. In the months of October and November, 1822, the bills of lading, in question, arrived. They were of timber, the property of the house. The defendant, who had for many years been employed by the house as broker, was requested to act as broker in the sale of the timber, and was told, that he must not set off the debt due to him from either of the firms against the proceeds, but must render an account of the whole proceeds, and pay them over; to which he agreed. There was, at that time, no contemplation of a bankruptcy by the firm; but it was intended that the business should be carried on by the partners, under the inspection of trustees, which was done from August 1822, to May 1823; and on the 29th of May, 1823, a commission of bankruptcy issued. The defendant sold the timber for 7,768*l.* 10*s.* and rendered an account, in which, after deducting the costs and charges upon the sale, and the debts owing to himself from both the firms, he credited the bankrupts with a balance of 925*l.* 13*s.* 10*d.*; and which balance he had paid into Court. This was the case on the part of the plaintiffs. On the part of the defendants, the following letter, sent to him by the old firm, at the time of their dissolution, and of the establishment of the new firm, was put in:—"London, 30th of April, 1821. Sir,—We beg to acquaint you, that Mr. Ellice retires from our firm from the present date. The business of the house will be continued, as heretofore, by the remaining partners, who assume the funds, and charge themselves with the liquidation of the debts of the partnership. We remain, &c., Inglis, Ellice and Co."—"A. Simson, Esq." It was contended, on the part of the defendant, that he was entitled to set off the debts due to him from both the firms, inasmuch as the new firm had, by that letter, expressly undertaken to liquidate "the debts of the partnership," that was, of the old firm. The Lord Chief Justice was of opinion, that Mr. Ellice, a partner in the old firm, being still alive, the defendant could not set off, as against the assignees of the new firm, the debt owing to him from the old firm; but that he might set off the debt owing to him from the new firm, the agreement to the contrary not being, in his Lordship's opinion, binding. He, therefore, directed the jury to find a verdict for the plaintiffs, for the amount of the proceeds of the timber, after deducting the charges of the sale, the sum of 418*l.* 4*s.* 2*d.*, due to the defendant, from the new firm, and the sum paid into Court.

Gurney now moved for a rule nisi for a new trial, or to increase the verdict by the amount of 418*l.* 4*s.* 2*d.*, the sum due from the new firm to the defendant. The defendant had no right, as against the assignees, to set off the debt due to him from either of the firms. He expressly undertook, in consideration of the commission to be paid him for the sale of the timber, not to set off either of the debts; but to account for, and pay over, the whole of the proceeds. That was a

promise founded upon a valuable consideration, and was, therefore, binding upon him. He entered into a special agreement, that this particular transaction should be kept distinct from all his former dealings with the bankrupts, and that the whole of the proceeds of the timber, with the exception of his own expenses and commission, should be paid over to them; he had, therefore, no right to retain any part of the money in respect of his own general balance. The transaction must have been considered as separate and distinct from all others between the bankrupts and the defendant, even if they had been acting for themselves only; and the defendant's undertaking so to consider it, would, even under those circumstances, have operated as a waiver of his lien upon the goods, or the produce of them, for his general balance. But the defendant knew, at the time when he entered into the agreement, and thereby obtained possession of the goods, that the bankrupts were in insolvent circumstances, and that they were not acting for themselves, but for the benefit of their creditors at large; and upon that ground, therefore, he could not be entitled to a lien upon the goods to the full amount of his own debt, to the prejudice of the rest of the creditors.

ABBOTT, C. J. This is an action by the assignees of the bankrupts. Their duty is a plain one. It is to take the account between the bankrupts, and those who are indebted to them on one hand, and have claims upon them on the other, precisely as it stands at the time of the bankruptcy. This is clear from the language of the statute 5 Geo. 2, c. 80, s. 28, which is not materially altered by the 6 Geo. 4, c. 16, s. 50, and which enacts, "that where it shall appear that there has been mutual credit given by the bankrupt and any other person, or mutual debts between the bankrupt and any other person, at any time before such person became a bankrupt, the assignees shall state the account between them, and one debt may be set against another; and what shall appear to be due on either side, on the balance of such account, and on setting such debts against one another, and no more, shall be claimed or paid on either side." This is clear, also, from the language of the Lord Chancellor, in the case *Ex parte Prescott*, 1 Atk. 280. There the petitioner was a creditor of the bankrupt upon simple contract, and a debtor of the bankrupt upon a bond; and he applied to be allowed to set off one against the other, under the 5 Geo. 2, c. 30, s. 28. The Lord Chancellor said, "I think this case is within the equity of the statute. Therefore, let it be referred to the commissioners to take the account between him and the bankrupt, and let what shall be found due from the bankrupt, at the time of the bankruptcy, be deducted out of what shall be due on the petitioner's bond, and the balance only be paid by the petitioner to the assignees." I think that case is applicable to the present; and, therefore, that so far as the bankrupt laws are concerned, the defendant is clearly entitled to deduct, from the claims of the assignees, the debt owing to him from the bankrupts. Neither do I think that the agreement entered into between the bankrupts and the defendant varies the case. I do not consider such an agreement binding upon the defendant, so as to deprive him of the legal rights which he possessed, of lien and of set-off. In the case of *Cornforth v. Rivett*, 2 M. & S. 510, this Court held that, in assumpsit for goods sold, the defendant might set off an acceptance of the plaintiff's, which had come into his hands after the delivery of the goods, although the defendant had agreed to pay for the goods in ready money.

BAYLEY, J. I am entirely of the same opinion. It was decided by this Court, in *Eland v. Carr*, 1 East, 875, that if to a plea of set-off, the plaintiff replies that the goods, for which the action is brought, were to be paid for in ready money—such replication is bad: and the same principle was recognised and acted upon by the Court of Common Pleas, in *Mayer v. Nias*, 8 J. B. Moore, 275, 1 Bing. 311. The other Judges concurred.

Rule refused.

M'CULLOCH v. DAWES and Another, Executors of ———, deceased.—p. 40.

When one of two joint executors was applied to for payment of a debt of his testator's, who had been dead 20 years, and as against whom the debt was barred by the Statute of Limitations, and said, "I believe the debt is a just one, and has never been paid. I should be happy to serve you in the matter if I could, but I cannot do anything without the consent of the (testator's) family:"—Held, in an action against both the executors, that there was no such acknowledgment of the debt, as took the case out of the Statute of Limitations, as against them; there being no promise, expressed or implied, to pay the debt.

ASSUMPSIT upon the money counts, averring promises, first by the testator in his lifetime, and secondly, by the defendants, as his executors, since his death. Pleas, first, non-assumpsit; and second, the Statute of Limitations. Issues thereon. At the trial before ABBOTT, C. J., at the London adjourned sittings after the last term, the case was this. The debt which the plaintiff sought to recover was incurred by the testator in the year 1796. The testator died in the year 1804. The defendants were his executors, but Dawes had taken the most active part in the arrangement of his affairs. It was admitted that, as to testator, the debt was barred; the question was, whether there had been such a promise to pay it by the defendant Dawes, within six years of the action brought, as would be binding upon both the defendants, and take the case out of the statute. Upon this point it appeared, that shortly before the action was brought, the plaintiff called upon the defendant Dawes, stated his claim upon the testator's estate, and expressed a hope that the executors would see it settled. Dawes admitted that the debt was a just one, and that it had never been paid; and said he should be happy to serve the plaintiff in the matter if he could, but that he could not do anything without the consent of the (testator's) family. The Lord Chief Justice was of opinion, that this was not such a personal acknowledgment of the debt, or promise to pay it, as would take the case out of the statute, and therefore nonsuited the plaintiff.

E. Lawes now moved to set aside the nonsuit, and for a new trial. He cited *Perry v. Jackson*, 4 T. R. 516; *Jackson v. Fairbank*, 2 H. Bl. 840; *Whitcomb v. Whiting*, Doug. 651; *Perham v. Raynall*, 9 J. B. Moore, 566, 2 Bingh. 311.

ABBOTT, C. J. It appeared at the trial, that the plaintiff's debt accrued in the year 1796; that the testator died in 1804; and that no claim was made in respect of the debt till a period of more than twenty years after his death. Under such circumstances payment was to be presumed, unless the contrary was clearly shown. Perhaps that was shown sufficiently, because one of the executors undoubtedly admitted that, so far as he knew, the money had never been paid. But the question is, whether there was such an acknowledgment of the debt by one of the executors, as raised an implied promise on behalf of himself and his co-executor to pay it, and took the case out of the Statute of Limitations as against them both. The evidence was, that Dawes said, he believed the debt was a just one, and had never been paid; and that he should be glad to serve the plaintiff in the matter, if he could, but that he could not do anything without the consent of the testator's family. I was of opinion at the trial, that this was not a personal promise to pay the debt, nor even a personal acknowledgment of its existence; but a mere reference of the plaintiff to the family of the testator, with whom it lay to say whether the debt would be paid or not, and consequently, that there was nothing to take the case out of the statute against the defendants. I am of the same opinion now, and therefore I think we ought not to grant any rule.

BAYLEY, J. I am of the same opinion. I think the nonsuit was perfectly right. The evidence scarcely amounted to an acknowledgment of the existence of the debt, but it certainly did not amount to a promise to pay it; on the contrary, the reference to the testator's family was a refusal to pay, for it was in effect saying, "I would serve you if I could—apply to the family—if they choose to pay it, they may, but without them I can do nothing." Such language could not properly be construed into a promise to pay a debt by any individual, and much less by an executor, whose testator had been dead twenty years, and where

the debt claimed is thirty years old. If executors could be bound by evidence so loose as this, their situation would be most alarming. They are bound, if possible to resist such a claim; they have no right to waive any legal defence to such an action: and if they did, and were to pay a debt, against the recovery of which there was any legal bar, they would render themselves liable over to those who were interested in the testator's property.

HOLROYD, J. I also think the nonsuit was right. There was no such acknowledgment of the existence of the debt, as amounted to an admission that the executor thought himself liable as such to pay it, or from which the law would imply a promise to pay; and a mere acknowledgment of the existence of a debt, unaccompanied by a promise, express or implied, to pay it, is not sufficient to take a case out of the Statute of Limitations.

LITTLEDALE, J., concurred.

Rule refused.

The KING v. The INHABITANTS of WARMINSTER.—p. 70.

A hiring, for an indefinite period, at six shillings a week for the winter, and nine shillings a week for the summer, is not a yearly hiring, and a year's service under it will not confer a settlement.

The KING v. WILLIAM FOWKE, Esq.—p. 120.

A lighthouse erected on the shore for conveying light to ships at sea, is not rateable in respect of the value of the tolls paid by the ship-owners for the benefit so communicated; but simply as a building.

SITTINGS IN HILARY TERM, IN K. B.

7 & 8 GEO. IV.—1827.

ROGERS v. BRODERIP, Esq.—p. 194.

The 2 Geo. 3, c. 28, which gives additional protection to justices in cases of actions brought against them for anything done in *pursuance of that act*, but which does not require notice of action, does not deprive them of their right to the notice required by the 24 Geo. 2, c. 44, which requires notice in cases of actions brought against justices for anything done in *execution of their office*. Therefore, where in an action against a magistrate, under the 2 Geo. 3, c. 28, the plaintiff proved service of a notice not perfectly conformable with the requisites of the 24 Geo. 2, c. 44, and was thereupon nonsuited:—Held, that the nonsuit was right.

The KING v. The JUSTICES of WORCESTERSHIRE.—p. 210.

Three several appeals involving the same facts, and the same questions of law, having been entered for hearing at sessions, and the appellants having agreed that the decision of the Court on one should bind the other cases, and the sessions having by a majority of justices decided with the respondent in the first:—Held, that the Court would not compel the sessions to hear the other cases, although the justices had granted a case, but not upon any doubt of their own as to the propriety of their decision.

Ex parte The TRUSTEES of The RUGBY CHARITY.—p. 214.

Mandamus refused to the Trustees of the Rugby Charity to compel the payment of increased alms to claimants on the funds, although the applicants were at an advanced age, and would probably be dead before relief could be had in Chancery.

The KING *v.* The Rev. SAMUEL DAVIS, Clerk.—p. 234.

Mandamus lies to a minister to restore a parish-clerk removed by him without just cause. And the Court will not judge of the justice of the cause of removal upon the *ex parte* statement of the minister; he must state it in his return to the *mandamus*, and give the clerk an opportunity of answering it.

WAGSTAFFE *v.* BOARDMAN.(a)—p. 248.

In an action by the endorsee against the endorser of a bill of exchange, evidence of an acknowledgment of an existing debt and of a promise to pay by the defendant, is admissible and sufficient to support a count upon an account stated.

ASSUMPSIT by the endorsee against the endorser of a bill of exchange, with the usual money counts, and a count upon an account stated. At the trial before Hullock, B., at the last assizes for the county of Lancaster, there appearing to be a fatal variance between the bill itself and the description of it in the declaration, it was admitted that the plaintiff could not recover upon the counts setting out the bill. It was then proposed to give evidence of an admission of the debt by the defendant, coupled with a promise to pay, which, it was contended, would entitle the plaintiff to recover upon the count upon an account stated. The learned Judge was of opinion that the evidence was not admissible, and nonsuited the plaintiff. In Michaelmas term last, a rule nisi for a new trial having been obtained,

Starkie now showed cause. The evidence was properly rejected. The plaintiff had no cause of action except upon the bill of exchange, and it was to that instrument the acknowledgment referred. There is no case to be found in which it has been held that such evidence would support a count upon an account stated, under such circumstances and between such parties as the present. *Knowles v. Mitchell*, 13 East, 249; *Leaper v. Tatton*, 16 East, 420; and *Highmore v. Primrose*, 5 M. & S. 65, will probably be cited on the other side; but in all those cases there was an original debt, there was a privity of contract between the parties, and the defendant was primarily liable. Here there was no original debt from the defendant to the plaintiff, there was no privity of contract between them, the defendant was not an original party to the bill, nor primarily liable to the plaintiff. The only dealing between these parties was constructively by the custom of merchants upon the bill, and therefore the plaintiff could rely only upon the bill to support his claim against the defendant.

D. F. Jones, contra, was stopped by the Court.

BAYLEY, J. I am of opinion that the evidence tendered and rejected in this case should have been received, and therefore, that there ought to be a new trial. Evidence of an existing debt is sufficient to support a count upon an account stated. The circumstance of the defendant in this instance not being an original

(a) The three puisne Judges of this court sat, as on former occasions, from Tuesday, the 13th, to Thursday, the 22d of February inclusive; and from Monday, the 30th of April, to Tuesday, the 1st of May, inclusive; during which periods this and the following cases were decided.

party to the bill makes no difference, for his endorsement of the bill created a debt from him to the endorsee. Besides, his acknowledgment of an existing debt, and his promise to pay it, created a privity of contract between him and the plaintiff, independently of the bill, and was good evidence to support the count upon an account stated. The rule for a new trial, therefore, must be made absolute.

HOLROYD, J., and LITLEDALE, J., concurred.

Rule absolute.

JAMES HAUGHTON LANGSTON v. Sir CHARLES MORICE POLE, Bart., HAUGHTON FARMER OKEOVER, MARIA SARAH LANGSTON, CHARLES BARTER the elder, and ELIZABETH CATHERINE his wife, and CHARLES BARTER the younger, an infant by his guardian.
—p. 298.

J. L. devised to his son J. H. L. for life; remainder to trustees to preserve contingent remainders; remainder to the second, third, fourth, fifth, and all and every other the son and sons of his said son J. H. L. in tail male, according to seniority of age and priority of birth. There was no limitation to the first son of J. H. L. The declaration of the trust contained a provision to raise money for the daughters of J. H. L. on failure of issue male of his body; and the will also provided that in case J. H. L. should have any child or children other than and except an eldest or only son, then J. H. L. might raise money for portions: Held, that the first son of J. H. L. took no estate under the will.

THE Master of the Rolls sent the following case for the opinion of this Court:—

John Langston, late of Sarsden House, Oxfordshire, Esq., now deceased, by his will, dated 28th July, 1801, gave and devised all his freehold and copyhold manors, messuages, farms, lands, tenements, tithes, and hereditaments, in the counties of Oxford and Middlesex, or elsewhere in England, with their appurtenances (except as therein mentioned), unto and to the use of his son James Haughton Langston, and his assigns during his life, without impeachment of waste; remainder to the use of trustees and their heirs during the life of the said James Haughton Langston, in trust to preserve contingent remainders; remainder to the use of the second, third, fourth, fifth, and all and every other the son and sons of his (the said testator's) said son James Haughton Langston, lawfully to be begotten, severally, successively, and in remainder one after another, as they and every of them should be in seniority of age and priority of birth, and the several and respective heirs male of the body and bodies of all and every such son and sons lawfully issuing, the elder of such sons, and the heirs male of his body, to be always preferred and to take before the younger of such son and sons, and the heirs male of his and their body and bodies issuing; remainder to his, testator's second and other sons successively in tail male; remainder to the use of other trustees for the term of 500 years, upon certain trusts thereafter mentioned; remainder to the use of the first, second, third, fourth, fifth, and all and every other the daughter and daughters of his said son James Haughton Langston, successively, in tail general; remainder to the use of other trustees for the term of 99 years upon the trusts thereafter mentioned; remainder to the use of testator's eldest daughter, Maria Sarah Langston, and her assigns for life, without impeachment of waste; remainder to the use of trustees during the life of the said Maria Sarah Langston, upon trust to preserve contingent remainders; remainder to the use of the first, second, third, fourth, fifth, and all and every other the son and sons of testator's said daughter, successively, in tail male; remainder to other trustees for the term of 600 years upon the trusts thereafter mentioned; remainder to the use of the first, second, third, fourth, fifth, and all and every other the daughter and daughters of the said Maria Sarah Langston, successively, in tail general; and for default of such issue, like remainders with like attendant terms to the use of testator's daughters,

Elizabeth Catherine Langston, Caroline Langston, Agatha Maria Sophia Langston, Henrietta Maria Langston, and their issue respectively; remainder to the testator's sixth and other daughters thereafter to be born, successively, in tail general; remainder to the use of other trustees for the term of 1500 years, upon the trust therein mentioned; remainder to the use of testator's sister, Sarah, the wife of Peter Cazalet, Esq., in fee. And the said testator did by his said will declare that the said term of 500 years was upon trust that the trustees thereof, in case there should be no son of the body of his said son James Haughton Langston, should by mortgage or sale of the premises comprised in the said term, raise money for additional portions and for maintenance, as therein mentioned. And the said testator did by his said will declare, that the said term of 99 years was upon trust, that the trustees thereof, in case there should be no son of the body of his said son James Haughton Langston, should levy and raise such sum and sums of money for portions as therein mentioned. And the said testator did by his said will declare, that the said term of 600 years was upon trust that the trustees thereof, in case there should be no son of the body of his said son James Haughton Langston, should raise such sum and sums of money for portions as therein mentioned. And the said testator did by his said will declare, that the said term of 700 years was upon trust that the trustees thereof, in case there should be no son or daughter of the said James Haughton Langston, should raise such sum and sums of money for portions as therein mentioned. And the said testator did by his said will declare, that the said term of 800 years was upon trust that the trustees thereof, in case there should be no son of the said James Haughton Langston, should raise such sum and sums of money for portions as therein mentioned. And the said testator did by his said will declare, that the said term of 900 years was upon trust that the trustees thereof, in case there should be no son of the said James Haughton Langston, should raise such sum and sums of money for portions as therein mentioned. And the said testator did by his said will declare, that the said term of 1500 years was upon trust that the trustees thereof, in case there should be no son of the said James Haughton Langston, should levy and raise such sum and sums of money as therein mentioned for the purposes therein also mentioned. And in the said testator's will is contained a power or proviso, authorizing his, the said testator's, said son, James Haughton Langston, from time to time, during his life, in case there should be any child or children of his, the said James Haughton Langston's body lawfully begotten, other than and except an eldest or only son, to charge portions as therein mentioned. And in the said will is contained a proviso, that in case the said testator's said son, James Haughton Langston, should die under the age of 21 years, and there should be no son or daughter of his body living at his decease; or being such, if all such sons should die under 21 years of age, and all such daughters should die under that age and unmarried; then the trustees of the said will should be possessed of certain stocks or funds therein mentioned, upon the trusts therein contained.

The said John Langston, the testator, departed this life in February, 1812, leaving the said James Haughton Langston, his only son and heir-at-law (then a minor), and several daughters, him surviving, having previously made three codicils to his said will, the last of which bears date in December 1811, but none of them making the least variation, or in any manner affecting the above-mentioned limitations of his real estates.

The said James Haughton Langston attained the age of 21 years in May 1817, and since that time intermarried, and has issue by his wife two sons, viz., Henry Langston, his eldest and first born son, and Edward Langston, his second born son.

The question for the opinion of the Court was, whether Henry Langston, the first son of the testator's son, James Haughton Langston, took any estate under the said testator's will.

Shadwell, for the plaintiff. The eldest son of James Haughton Langston, the testator's eldest son, took an estate tail in remainder under the will. The

Court must look at the whole will, in order to arrive at the true construction of any particular part of it. The limitation to the sons of the testator's eldest son contains express words of gift, and a sufficient description of the persons meant to take, among whom it is clear from the whole of the will that the eldest son was intended to be included. In the specific enumeration, of the second and other sons, the first undoubtedly is omitted; but the subsequent general words supply that omission, for they are "all and every other son and sons." Those words must have been intended to comprehend all sons, whether previously enumerated or not; and taken in their ordinary grammatical sense, they do in point of fact comprehend all the sons; which they could not do unless they included the first, though omitted in the enumeration. [BAYLEY, J. Is it not one rule of construction, that where a specific enumeration begins with inferior persons, subsequent general words will not include superiors? It is so with respect to acts of parliament; (a) does not the rule apply here?] It is submitted that it does not. The principle upon which it applies to statutes is, that such a construction is consistent with the intention of the legislature; (b) here such a construction is inconsistent with the evident intention of the testator. His intention clearly was that the eldest son should take, for there are no words expressly providing that he shall not take. [BAYLEY, J. Perhaps the strongest way in which you can put your argument is, to say that this limitation consists of two clauses. But even then, the second, third, fourth, and fifth sons would take first under the first clause, and the first, sixth and other sons would take afterwards under the second clause.] In answer to that difficulty it may be observed, that the order of the limitations is not the only criterion for the true construction of the will, and that the Court may transpose the two clauses in this case, in order to effectuate the intention of the testator. There is not one other limitation in the will, numerous as they are, in which the first child, whether son or daughter, is not expressly mentioned; that shows that it was omitted in this limitation merely by mistake. If there had been a first son born and no other, this limitation would fail altogether, if the first son does not take under it. In one of the provisos of the will, the testator in express terms anticipates the existence of an eldest son, which seems to be unaccountable, unless he intended such eldest son to take under the will. The present case is very similar to that of *Doe d. Le Chevalier v. Hathwaite*. (c) There A. devised to S. D. for life, remainder to his first, second, third, third, fourth, fifth, sixth, and other sons, in tail male, according to seniority of age and priority of birth, remainder to his first, &c., and other daughters in tail general; remainder to G. H. the eldest son of J. H., for life, remainder in strict settlement to his first and other sons in tail male, and first and other daughters in tail general; with like limitations as to S. D.; remainder to S. H., the second son of J. H., for life, remainder to his first and other sons and daughters in strict settlement; remainder to J. H. the third son of J. H., for life, remainder to his first and other sons and daughters in strict settlement, with similar limitations. J. H. was the second son, and S. H. the third. It was held, that S. H. being rightly named, was entitled to take, although wrongly described in the will as being the second son of J. H. [BAYLEY, J. There was a palpable misdescription of the devisee in that case.] Which was matter

(a) "A statute, which treats of things or persons of an inferior rank, cannot by any general words be extended to those of a superior. So a statute (13 Eliz. c. 10), treating of 'deans, prebendaries, parsons, vicars, and others having spiritual promotion,' is held not to extend to bishops, though they have spiritual promotion, deans being the highest persons named, and bishops being of a still higher order." 2 Bla. Comm. 88, 18 Ed.; Archbishop of Canterbury's case, 2 Co. Rep. 46.

(b) Professor Christian, in his note to the above passage in the Commentaries, takes the same view, and says, "This construction must be presumed to be most conformable to the intention of the legislature."

(c) 2 Moore, 304, the marginal note of which report is copied into the text. S. C., not S. P. 3 B. & A. 632. The marginal note of the latter report describes the devise nearly in the same terms as the former, but concludes thus:—Held, that evidence of the state of the testator's family, and other circumstances, was admissible to show whether he had mistaken the name of the devisee or not; and that, upon such evidence being given, the jury might find the fact whether the mistake of the testator was in the name or the description of the devisee.

of mistake, and, therefore, held not to vitiate. Here there is a palpable mistake also, in the omission of the word first, which ought not to defeat the limitation, especially as it is clear from other parts of the will that the first son was intended to take.

Horne, contrd. It lies upon the plaintiff to prove the affirmative of the question propounded by the case. He must show that the will contains a devise to the eldest son. But the will contains no such devise. It does contain a devise to the second and other succeeding ones; but it studiously avoids any devise to the first son. The limitation in question is the first that occurs in the will, and the eldest son would doubtless have been named there, if the testator had intended to name him at all. But he is never named in the will, at least as a devisee, for the allusion in the proviso to an eldest or only son is with a wholly different view. It is said that the omission was unintentional, and that the testator intended to make, and seems to have thought that he had made, provision for the first son. But he has not made such provision, and the Court cannot make it for him. The Court cannot make a will for the testator either in whole or in part; nor introduce into the will the name of a devisee not inserted by the testator, which they are asked to do to-day; for that would be, in part, to make a will for him. The case cited on the other side is very distinguishable from the present. There the testator had made a palpable mistake in the description of a person whom he had named in his will, and evidently intended to take under it. Here the eldest son is entirely omitted in the first limitation, and the mention of the first son in all the other limitations rather tends to the presumption that the omission in the first was not accidental or unintentional.

Shadwell, in reply. No answer has been given to the argument originally advanced on the part of the plaintiff, namely, that the first limitation contains a devise to all sons, necessarily, therefore, including the first. Giving to the words "all and every other son and sons" their natural and ordinary import, they as clearly and necessarily include the first as the sixth, for neither of them is specifically mentioned. [LITTLEDALE, J. "All and every other" may have been meant to apply only to sons born after the fifth, and may have been introduced merely to prevent the necessity of enumerating one by one all the sons that might by possibility be born.] It seems a narrow mode of construction to limit words so very large and general to persons inferior in order of birth to those previously specified. The statute 13 Eliz. c. 10, which is given in the books as an instance of the rule of construction mentioned by the Court, does not contain the words "all and every other," but merely the word "others," (a) which is a very important distinction, and removes the applicability of the rule to this case. Unless the word "all" is erased from the will, it is impossible to say that the first son is not included as well as the sixth, who it is admitted is included.

The Court took time to consider of the case, and afterwards sent the following certificate to the Master of the Rolls:—

"This case has been argued before us by counsel. We have considered it, and are of opinion that the said Henry Langston, the first son of the said James Haughton Langston, did not take any estate under the said will.

J. BAYLEY.

G. S. HOLROYD.

J. LITTLEDALE." (b)

(a) Ante, note (a).

(b) Upon receiving this certificate, the then Master of the Rolls, Sir John Leach, who had succeeded Lord Gifford, by whom the case was sent to this Court, directed a case to be sent for the opinion of the Court of Common Pleas, "whether Henry Langston, the first son of the testator's son James Haughton Langston, took any and what estate under the said testator's will; and the Judges of that Court certified that they were of opinion, "that the said Henry Langston, the first son of the said testator's son James Haughton Langston, took an estate in tail male under the said will, expectant on the decease of his father, the said James Haughton Langston." The case sent to the Court of Common Pleas set forth the will much more fully than it was set out in the case sent to this Court. See the variations between the two as pointed out in *Langston v. Pole*, 1 Tamlyn's Chancery Cases, 128; see also the report of the case in

the Court of Common Pleas, 5 Bingh. 228. Upon receiving the latter certificate, the Master of the Rolls, principally, it should seem, for the purpose of enabling the parties to carry the cause to the House of Lords (see 1 Tamlyn's Chancery Cases, 133), came to an immediate decision upon the case, adopting the opinion of the Court of Common Pleas. The cause is now (June, 1830) before the House of Lords.

WIDGER v. BROWNING and Another.—p. 306.

A debtor appointing a time and place to meet and pay his creditor, and failing to keep the appointment, must be presumed, in the absence of evidence to the contrary, to have absented himself with intent to delay his creditor, and thereby commits an act of bankruptcy, and in an action by a bankrupt against his assignees to try the validity of the commission, the plaintiff must give evidence to rebut the presumption, or he cannot maintain the action.

BARON v. MARTELL.—p. 390.

By the master's allocatur an attorney was ordered on the 12th May to pay over to his client a sum of 15*l.*; on the 26th June the attorney became bankrupt, and afterwards obtained his certificate:—Held, that it was then too late to move for an attachment for not paying the money pursuant to the master's allocatur.

SITTINGS IN EASTER TERM, IN K. B.

8 GEO. IV.—1827.

CRIPPS v. BLANK.—p. 480.

A person having title to land sued for use and occupation against A., who had received possession from a third person:—Held, that the declaration of A., "I don't consider the land as yours, but prove the right, and I'll pay you rent," would not support assumpsit for use and occupation.

ASSUMPSIT for the use and occupation of a certain piece of land. Plea, the general issue. At the trial at the last summer assizes for the county of Bucks, it appeared in evidence that a former occupier of the land in question had rented it of the landlord at five shillings per annum. After being in possession for fourteen years and paying rent, he quitted and another person took possession. After an interval of time, he gave up possession, and then the defendant came in. About two years before the trial the plaintiff became owner of the land, and he then applied to the defendant either to give up possession, or pay for it as the former occupiers had done. The defendant replied, "I do not consider the land as yours, but prove your right, and I'll pay you for it." The plaintiff then brought the present action, and after proving his title to the land, relied upon this conditional promise to sustain assumpsit for use and occupation. The learned judge was of opinion that under these circumstances the action would not lie in the absence of proof of unqualified attornment, and directed a nonsuit.

Robinson now moved for a rule nisi to set the nonsuit aside and obtain a new trial. The question is whether an action for use and occupation can be maintained upon evidence of title merely, without any proof of an unqualified recognition by the tenant of the landlord's right to sue. Now this case falls within the general principle, that in an action for use and occupation a tenant cannot call

upon his landlord to show title. *Cooke v. Loxley*, 5 T. R. 4. Here it is clear that the defendant is permitted to remain in the possession of the land by the plaintiff, and the defendant, after a notice that the plaintiff is the landlord, keeps possession. This is sufficient to entitle the plaintiff to maintain use and occupation without being driven to the necessity of bringing trespass or ejectment.

LORD TENTERDEN, C. J. I think we are not called upon in this case to decide the general abstract question, whether it is competent for the owner of land to bring an action for use and occupation, instead of trespass, against a person who has entered upon the land without any communication with the owner of the land. It is sufficient for the present case to say, that the evidence on this trial will not sustain the action in the present form. It appeared in evidence that a former occupier of the land in question consented to pay for it at the rate of five shillings a year, and for some time he paid the money accordingly. Upon his quitting, some other person came into the possession of the land, and that person resigned the possession. After an interval of time the defendant came in. Application is then made to him by the plaintiff not to give up the land, but to pay for it as former occupiers had done. The defendant replies, "I don't consider the land as yours; prove your right to it, and I'll pay you for it." This amounts to no more than this, "When you have a title, I am contented to be considered as occupying by your permission." The learned judge thought that this could not be treated as an unconditional promise to pay rent, or an acknowledgment of the plaintiff's general right to recover for use and occupation, and I think his decision was correct.

BAYLEY, J. I am of the same opinion. The general rule certainly is, that if A. receives possession of land from B. he cannot dispute the title of the latter in an action for use and occupation, but where he receives possession from another person, he may dispute the title of the party suing as landlord. Here the defendant did not receive possession from the plaintiff, and therefore the evidence produced could not support use and occupation.

HOLROYD, J., and LITTLEDALE, J., concurred.

Rule refused.

COOKE v. JACKSON.—p. 495.

In trespass *quare clausum fregit*, with a plea of *liberum tenementum*, proof that both parties have a close of the same name will not prevent the plaintiff from recovering without a new assignment.

TRESPASS for breaking and entering the plaintiff's close, called Broadmead. Plea, *liberum tenementum*; and issue thereon. At the trial both parties proved that they were respectively possessed of parcels of land called Broadmead, both in the same parish. It was objected at the trial that the plaintiff ought to have new assigned so as to make the defendant a trespasser in the *locus in quo*. The objection, however, was overruled by the learned Judge, on the authority of *Cocker v. Crompton*, 1 B. & C. 499, and the plaintiff had a verdict.

Ludlow now moved for a rule nisi to enter a nonsuit, and contended that this case was not governed by *Cocker v. Crompton*, but stood upon the old rule of pleading, by which the defendant was entitled to the benefit of the common bar, if he had a close corresponding in name with the close mentioned in the plaintiff's declaration, and he cited *Goodright v. Rich*, 7 T. R. 335, and *Hock v. Bacon*, 2 Taunt. 156.

LORD TENTERDEN, C. J. Two points have been settled in cases of this description; first, that if the plaintiff in a declaration of trespass names his close, and the defendant pleads *liberum tenementum* generally, he cannot by showing that he himself is possessed of a close of the same name, and in the same vill, turn the plaintiff round and prevent his proving a trespass in his own close:

and secondly, that where there is a general district of land known by one general name, and there are several occupiers in the same district, each person may call his own part of the district by the general name. Here the plaintiff has a part of the district called Broadmead, and he has a right to call his close by the name of Broadmead. The defendant also has a close called Broadmead in the same district, and he also has a right to call his close by that name; but that will not prevent the plaintiff without a new assignment from going into evidence to show that the two closes are not connected one with another. It appears to me, therefore, that the verdict must stand.

BAYLEY, J. I think this case falls within the principle of the decision in *Cocker v. Crompton*.

HOLROYD, J., and LITLEDAL, J., concurred.

Rule refused.(a)

(a) Vide *Stevens v. Whistler*, 11 East, 51, and *Pratt v. Groome*, 15 East, 235.

MORTIMER v. HARRIS.—p. 534.

The Court, without a Judge's certificate, will not enter a suggestion on the roll to deprive the plaintiff of his costs under 5 Geo. 4, c. 106, in an action where the defendant resided in Wales at the time of serving process, although the sum recovered was under 50*l*.

WEARE v. CALDER.—p. 546.

Trover is not a cause of action within the operation of the Bath Court of Requests act 45 G. 3, c. 67.

AUSTIN v. DENNIFORD.—p. 600.

Where assignees under a second commission of bankrupt have refused to interfere, and the bankrupt has not paid 15*s*. in the pound, but has effects whereon to levy, a creditor may take out execution upon a judgment recovered before the second commission.

FREE, D. D. v. BURGOYNE.—p. 601.

A plaintiff in prohibition obtaining judgment after demurrer, is not entitled to costs, except his case is within 8 & 9 W. 8, c. 11, s. 3; and if the judgment he obtains is for a partial prohibition, and a partial consultation, his case is not within that statute.

WILMOT v. WILKINSON.—p. 620.

By writing not under seal, A. agrees in consideration of 7000*l*., to present the nominee of B. to the next turn of a rectory, and to furnish an abstract of title to, and execute a conveyance of, the next presentation, to B.: such a writing is only an agreement, not a conveyance, and does not require an *ad valorem* stamp. Afterwards A., by consent of B., agrees to sell the next presentation to C. for 7500*l*., on having such a title as A. had received, C. paying to B., absolutely, on a day certain, the odd 500*l*. A. furnishes an abstract of such title as he

had received, which C. refuses to accept, and no conveyance is tendered to him. B. sues C. for the 500*l*. There is a good consideration to support the action. And having done all that his contract required, it is no answer to the action that no conveyance was tendered to C.

ASSUMPSIT on a special agreement, with the common money counts, to recover 500*l*. and interest. Plea, non assumpsit; and issue thereon. At the trial before Lord Tenterden, C. J., at the Middlesex sittings after Michaelmas term, 1825, a verdict was found for the plaintiff, subject to the opinion of the Court upon the following case.

On the 22d of March, 1824, an agreement in writing was made between Messrs. Goodacre and Buzzard and the plaintiff as follows:—

“Agreement between the undersigned M. Buzzard, on behalf of himself and his partner, J. Goodacre, and their respective heirs, executors, and administrators, of the one part; and the undersigned E. C. Wilmot, on behalf of himself and his heirs, executors, and administrators, of the other part, as follows: In consideration of the sum of 7,000*l*. of lawful money of Great Britain, to be paid in manner hereinafter mentioned, he the said M. Buzzard doth hereby, for himself and his said partner J. Goodacre, agree to present such person to the rectory of Presteign, in the county of Radnor, vacant by or immediately upon the death, resignation, or sooner determination of the incumbency of the present incumbent, with all the great and small tithes, oblations, &c., as he the said E. C. Wilmot, his executors, &c., shall nominate or appoint; and further, that M. Buzzard shall forthwith furnish an abstract of title to the same presentation, and deduce, at the costs and charges of himself and his said partner, or one of them, a good, valid, and marketable title to the same; and also execute a proper conveyance of the same to him the said E. C. Wilmot, his executors, &c.; such conveyance to be prepared at the expense, costs, and charges of the said E. C. Wilmot, his executors, &c.

On the 12th of July, 1824, another agreement was entered into between the said Messrs. Goodacre and Buzzard and the defendant, as follows:—

“Memorandum, July, 1824. Messrs. Goodacre and Buzzard, with the consent of E. C. Wilmot, agree to sell to T. Wilkinson the next presentation to the living of Presteign, Radnorshire, which they have purchased of Lord Oxford, for the sum of 7,500*l*. to be paid for at Michaelmas next, on having such title as they have received from Lord Oxford and Lord Harley and their trustee, Mr. Moore, with their covenant for the return of the money in the event of their being unable to procure the nominee of Mr. Wilkinson induction and quiet possession of the living for six months after the next vacancy of the same. Mr. Wilkinson to have the option of paying the 7,000*l*. part of the 7,500*l*. absolutely to Messrs. G. and B., or to have the same invested in their names and that of Mr. Wilkinson's trustee, he, Mr. W. paying interest at 5*l*. per cent. on the 7,000*l*. and receiving the dividends or interest resulting from the same, Mr. Wilkinson paying at Michaelmas the remaining 500*l*. absolutely to Mr. Wilmot, with G. and B.'s consent.”

At the foot of this agreement was written and signed by the plaintiff, as follows: “I hereby ratify, on my part, the above agreement.”

The above-mentioned agreement of the 22d of March, 1824, was stamped with a 1*l*. stamp. An abstract of the title to the said next presentation was delivered to the defendant's attorney on or about the 20th day of June, 1824, and two original deeds of the 18th day of July, 1823, whereby Lord Oxford, Lord Harley, and Mr. Moore, conveyed to Goodacre and Buzzard, were in due time shown to, and examined by, the defendant's attorney, and were well executed, and corresponded with the said abstract. No other of the deeds or muniments set forth in the said abstract were at any time produced to the defendant or his attorney. The defendant, after July, 1824, offered the benefit of his interest under the said agreement for sale, such as it was, if the purchaser chose to take his chance. After the death of Buzzard, and before the 29th of September, 1824, Goodacre's attorney required the defendant to pay the 7,000*l*. and offered to enter into a covenant pursuant to the said agreement. The defendant required Goodacre and Buzzard's attorney to give him an inspection of the other deeds mentioned in the

abstract, which he did not do, declaring it was not in his power. The plaintiff, on the 29th of September, 1824, demanded the 500*l.*, but never tendered any draft of a conveyance to the defendant. Buzzard died on the 22d September, 1824. Goodacre did not consent, but objected to the payment over of the 500*l.* to the plaintiff. No evidence was given on the part of the plaintiff of any consent by the devisees or representatives of Buzzard, or by Moore. No money was ever paid by the plaintiff to Goodacre and Buzzard, or either of them.

Chitty, for the plaintiff. Two objections were taken on the part of the defendant at the trial; first, that the agreement required an *ad valorem* stamp, as being a conveyance; and secondly, that the plaintiff should have tendered a conveyance to the defendant. There is no weight in either of these objections.

D. F. Jones, contra. Cited *Jones v. Barkley*, 2 Dougl. 684.

Lord TENTERDEN, C. J. I am of opinion that the plaintiff is entitled to recover the 500*l.* demanded by this action. The objection to the stamp has been already sufficiently answered, therefore I say nothing upon that subject. Then as to the instrument: it is no conveyance, either in its effect, or in the intention of the parties. Whatever might have been its language, it could not possibly operate as a grant of the next presentation, because it was not under seal; and I think it was not intended so to operate. The case then stands thus: the plaintiff having made one bargain with Goodacre and Buzzard for the next presentation, another bargain was afterwards made, with the plaintiff's consent, between Goodacre and Buzzard and the defendant, by which they agreed, not to make a good title, but to sell the next presentation for 7,500*l.* to be paid on a particular day, on having such title as the vendors had received; with a covenant for a return of the money in a certain event, and an option to be exercised by the defendant as to the 7,000*l.* for his further security, but from which the 500*l.* was expressly exempted. That agreement the plaintiff ratified, having previously acquired an interest in the subject-matter of it, so that, without his consent, Goodacre and Buzzard could have made no agreement with the defendant; there was, consequently, a good consideration for the promise to pay the 500*l.* to the plaintiff. Then come the objections that the vendors did not shew a good title, and did not tender any conveyance. If they did all that their contract required, and more was demanded, that released them from the obligation of taking any further steps in the transaction. I am at a loss to conceive what language a man is to use who intends to sell such a title as he has received, and nothing more, if the language of this agreement is not sufficient so to limit his undertaking. If a purchaser will bargain thus rashly to pay for such a title as the seller has, it is his own fault if his money is placed in hazard by the insufficiency of that title; though here no hardship could be sustained, because the principal money was secured. Then, as there was a good consideration for the defendant's promise, and as the vendors have done all that their contract required, the only remaining question is whether the stipulation for the consent of Goodacre and Buzzard, means a consent to be given at the time when the money was to be paid, or at the time when the contract was entered into. I think it means the latter; that such consent was a part of the consideration for the plaintiff giving up his bargain; that it was incorporated in the agreement, and could not afterwards be recalled. I am, therefore, of opinion that the plaintiff is entitled to judgment.

The other Judges concurred.

Postea to the plaintiff.

The KING v. The Inhabitants of GREAT YARMOUTH.—p. 682.

Where an order of removal was made by two justices, one of whom appeared by the order to be one of the churchwardens making the complaint:—Held ill.

SITTINGS IN TRINITY TERM, IN K. B.

8 Gm. IV.—1827.

E. BRYDGES v. H. PLUMPTRE.—p. 746.

Where, after the lapse of six years, a defendant, being asked for the payment of a debt, said, "I owed the money, but I have a receipt in full of all demands, I shall search for it, and let you know in the event of my not being able to find it:"—Held, that this was not sufficient to take the case out of the statute of limitations.

THIS was an action of debt to recover a sum of six guineas, claimed to be due from the defendant to the plaintiff for the balance of wages. The defendant pleaded, first, the general issue, and, secondly, the statute of limitations. At the trial before Graham, B., at the last Summer assizes for the county of Kent, it appeared that the plaintiff had quitted the defendant's service in 1816, at which time there was due to him the sum of six guineas. In order to take the case out of the statute of limitations, it appeared that, shortly before action brought, the defendant was applied to for payment of the money, and he said, "Brydges quitted my service in 1816. I owed him six guineas, but I have his receipt in full of all demands; I shall search for it, and I shall let you know in the event of my not being able to find it." It was contended that this was an admission of the debt, and that the defendant was bound to pay it, and that he was liable for the amount in failure of proof of the receipt in full of all demands. The learned Judge was inclined to think, that as the defendant had relied then upon a receipt in full of all demands, and did not produce it, his statement must be considered as an admission that he was bound to pay, and the plaintiff had a verdict. In Easter term a rule nisi was granted for entering a nonsuit, against which

Adolphus and *Platt* now showed cause, citing *Hellings v. Shaw*, 1 J. B. Moore, 340; 7 Taunt. 608.

Marryat, *contra*, was stopped by the Court.

LORD TENTERDEN, C. J. I am of opinion that the rule must be made absolute for entering a nonsuit. In the case of *Tanner v. Smart*, 6 B. & C. 603, it was decided by us last term, that in order to take a case out of the statute of limitations, the evidence must be such as fairly shows a promise to pay the debt supposed to be due. In that case there was a positive promise to pay the debt in these terms, "I cannot pay the debt at present, but I will pay it as soon as I can." We held that as there was no proof that he could pay the money, or was of ability to pay, even that promise was not sufficient to take the case out of the statute. According to our decision in that case, which was very much considered, I am clearly of opinion that this rule must be made absolute. Taking the whole of what the defendant said, it is quite manifest that he did not intend to pay the debt, and I cannot infer a promise to pay, if a man does not intend to pay a debt which he has all along resisted, even though the ground of his resistance cannot be afterwards sustained in evidence.

HOLROYD, J.(a) I am of the same opinion. It is said that the learned Judge considered this as an admission on the part of the defendant that he was bound to pay. I do not think that it is by any means such an admission. When applied to for payment, he says he has a receipt in full of all demands, but he cannot find it, and that he considered all the claims between him and the plaintiff at an end.

LITTLEDALE, J. The statute of limitations enacts, that the action shall be brought within six years and not after; but a great many decisions have taken place since the statute, which have gone to say that it may be brought after the

(a) BAYLEY, J., had left the Court.

original cause of action upon a fresh cause of action arising upon a new promise; but in such cases there must be something said by the party which is tantamount to a new promise to pay. Now so far from this being a promise to pay, it is a denial of the debt, and although the defendant says he has a receipt in full of all demands, still he is not bound to produce the instrument. I cannot say that his saying, whether true or false, that he has a receipt in full of all demands, is to be construed into an admission of his liability. Rule absolute.

The KING v. The Trustees of the River WEAVER.—p. 788.

Trustees are not rateable to the poor in respect of the tolls of a navigation received by them, the surplus of which is by statute made applicable to the repair of public bridges and highways.

ARLETT v. ELLIS, HEWETT, SHEFFORD, and MILES.—p. 897.

Quere, whether the lord of a manor may, in general, make grants of the waste upon which the copyholders have a right of common, provided he leave sufficient for the copyholders. A special custom that he may, leaving sufficient for the copyholders, would be good. Semble, that a special custom that he may, without limit, would be bad.

REPORTS OF CASES
ARGUED AND DETERMINED
IN THE
COURT OF COMMON PLEAS,
AND
EXCHEQUER CHAMBER.

BY JOHN BAYLEY MOORE,
Of the Inner Temple, Esq.

VOL. XI.

**Containing Cases from Michaelmas Term, 1825, to Trinity Term,
1826.**

CASES
ARGUED AND DETERMINED
IN THE
COURTS OF COMMON PLEAS
AND
EXCHEQUER CHAMBER,
IN
Michaelmas Term,
6 GEO. IV.—1825.

GENSHAM v. GERMAIN.—p. 1.

An award cannot be objected to on account of anything that does not appear on the face of it. Therefore, where an arbitrator had awarded to an apothecary in London charges for attendances, the Court refused to refer back the award to him for reconsideration.

AN action having been brought by the plaintiff, an apothecary practising in London, for the amount of his bill, it was referred, by consent, to a barrister to ascertain the sum due from the defendant. He awarded the plaintiff 77*l.*, allowing, amongst other things, charges for attendances.

Mr. Serjeant *Taddy* now moved for a rule calling on the plaintiff to show cause why the award should not be referred back to the arbitrator to strike out those charges, as the plaintiff, being only an apothecary, was not entitled to them. He cited the case of *Bonner v. Liddell*, 1 Brod. & Bing. 80, where the Court held an award to be void, the arbitrator having exceeded his authority; and submitted, that, as the plaintiff could not have recovered the charges objected to, had the action proceeded, the arbitrator ought not to have allowed them.

Per Curiam. The award is conclusive, there being nothing on the face of it to warrant the objection. Affidavits cannot be received to show what particular charges have been allowed. Rule refused.

SUMNER v. BATSON sued by the name of BATLEY.—p. 39.

If the defendant's surname be misstated in a writ, the Court will not set aside the process on motion, but will leave the defendant to his plea in abatement.

MR. Serjeant *Wilde* applied for a rule, calling on the plaintiff to show cause why the writ of *capias* issued in this cause, and the declaration and subsequent proceedings thereon, should not be set aside for irregularity. He founded his

motion on an affidavit of the defendant which stated that he was described in the writ and declaration as Thomas Batley; that his real name was Thomas Batson; and that he had always gone and been known by that name and no other.

The Court refused the application, saying that they would leave the defendant to his plea in abatement; as the Court of King's Bench had lately decided that they would not set aside process for a mere irregularity or formal defect, on motion; and that a party in such case is not entitled to indulgence; and they observed, that, on a plea in abatement, if the plaintiff enter a *cassetur*, he is not liable to costs, although he might be, if the Court were to allow the proceedings to be set aside for irregularity. Rule refused. (a)

(a) See *Sarjant v. Gordon*, 7 Dowl. & Ryl. 257; *Rolph v. Peckham*, 6 Barn. & Cres. 164. In these cases, the Court of King's Bench drew a distinction, and said, that, if the defendant's name be omitted or misstated in *bailable* process, the Court will set it aside on motion, but that, in *serviceable* process, they will leave the defendant to his plea in abatement.

BUCKENHAM v. FRANCIS, WHITE, and BULLER.—p. 40.

Trespass for breaking open the outer door of the plaintiff's dwelling-house, and entering therein, &c. Plea, justifying the entry, generally, under a *pluries fi. fa.*

Demurrer, assigning for cause that in the plea it was not averred that the outer door was open at the time the defendants entered under writ:—Held, that the plea was bad.

THIS was an action of trespass. The first count of the declaration stated, that the defendants broke and forced open, broke to pieces, and destroyed, one of the outer doors of the plaintiff's dwelling-house, and after having so forced open and broken the said outer door, entered the house and made a great noise and disturbance therein, and continued making such noise and disturbance for a long time, to wit, for the space of twelve hours then next following, whereby, &c. The second count was for breaking and entering the house, and continuing therein for the space of twelve hours.

The defendants pleaded,—first, not guilty, on which issue was joined;—secondly, as to the breaking and entering the house, that the defendant Francis had recovered a judgment against the plaintiff in the Court of King's Bench; and that, for the obtaining satisfaction thereof, he, Francis, sued out a *pluries fieri facias*, which writ was delivered to the sheriff to be executed; by virtue of which, he made his warrant, directed to the defendant White, he then being bailiff of the sheriff, commanding him to levy on the plaintiff's goods; which warrant was afterwards delivered to White, as such bailiff, to be executed; by virtue of which he, and the defendants Francis and Buller as the servants of White, and by his command, peaceably and quietly entered into the plaintiff's house in order to seize and take, and did seize and take, in execution certain goods of the plaintiff, and by sale thereof levy a certain sum; and that, in so doing, the defendants did necessarily make a little noise and disturbance in the plaintiff's house, and stay therein for the space of time in the declaration mentioned, as they lawfully might for the cause aforesaid.

To this plea the plaintiff demurred specially, and assigned for cause, that the defendants had therein attempted to justify the entering into the plaintiff's house, and whereof he had complained against them, under the said writ in the plea mentioned, and the warrant granted thereon; but that they had not stated or alleged in or by that plea, that the outer door of the said house was, at the time of such entering, open, which was a material and necessary averment in a plea justifying an entry into a dwelling-house under civil process; and that, for anything which appeared in the plea, the defendants might have obtained, as in fact they did, entry into the house by breaking open the outer door thereof, which would be illegal, inasmuch as persons acting under civil process, which

was the process in the plea mentioned, and under and by virtue of which the trespasses in the declaration mentioned were in that plea attempted to be justified, cannot justify the breaking open an outer door without becoming trespassers *ab initio*; and yet, that the defendants had not in or by their plea averred or shown that the outer door of the dwelling-house, at the time of their entering, was open.

The defendants joined in demurrer.

The cause now came on for argument, when Mr. Serjeant *Wilde*, in support of the demurrer, was stopped by the Court, who called on—

Mr. Serjeant *Taddy* to support the plea. He cited 5. Rep. 92 b; *Lee v. Gansel*, 1 Cowp. 1.

Lord Chief Justice BEST. I am clearly of opinion that this plea is bad in form and in substance, as the defendants did not deny, but in fact admitted, that they had broken open the outer door of the plaintiff's house, which was the substance of the charge in the first count of the declaration. The plea, therefore, would have been bad on general demurrer, or it might have been treated as a nullity. The trespass stated at the commencement of the first count, was, the breaking open the outer door, and entering the house. This must be taken to be one continuing trespass; and it is quite clear that a plea of justification should contain an answer to the whole of the plaintiff's charge as alleged in the declaration, which the defendants here have not done. Although there are two counts, it was incumbent on the defendants to plead to the whole of the trespasses contained in the declaration. They have not attempted to justify the breaking open of the outer door, as specifically charged in the first count; and it cannot be contended for a moment that they had any authority so to do.

The rest of the Court concurring—

Judgment for the plaintiff.

THORPE v. GISBOURNE.—p. 55.

A motion for an attachment against a person subpoenaed as a witness, for not attending at a trial, must be made within the Term succeeding the trial, and a copy of such subpoena must be delivered personally at the time of service.

At the trial of this cause, before Lord Chief Justice Best, at Westminster, at the Sittings after the last Easter Term, a witness of the name of Hunter not having obeyed a subpoena, nor been in attendance when the cause was called on—

Mr. Serjeant *Wilde*, on a former day in this Term, obtained a rule nisi for an attachment against him.

Mr. Serjeant *Vaughan* now showed cause, and submitted, that the application for the attachment was too late, as Trinity term had intervened since the service of the subpoena, and no steps had been taken in the course of that term. The learned Serjeant also produced several affidavits, which showed that Hunter was subpoenaed on the race-course at Epsom, during his attendance at the races there; but it did not appear that a copy of the subpoena had been personally delivered to him, or that it had issued out of this Court.^(a)

Mr. Serjeant *Wilde*, in support of his rule, was stopped by the Court.

Per Curiam. As the party applying for the attachment against Hunter for not obeying the subpoena, has not shown us that a copy was delivered to him personally, there is no sufficient proof of service on him, without which he cannot be brought into contempt. But, independently of this, a motion for an attachment against a person subpoenaed as a witness, for not attending, should, as in other cases of contempt, be brought forward as soon as possible; and, therefore, in a case of ——— v. St. Leger, 2 Tidd, 9th edit. 808, the Court of King's Bench refused an attachment in Hilary term, for the non-attendance of

(a) See *Smalt v. Whitmill*, 2 Str. 1054.

a witness at the preceding Summer Assizes, and left the party complaining to his civil remedy. We intend to adopt this rule in future; and, unless an application for an attachment be made in the term succeeding the service of the subpoena and trial, it cannot be entertained. This rule however must be
Discharged without costs.

CASES IN HILARY TERM,

6 AND 7 GEO. IV.—1826.

HOMAN v. TIDMARSH, sued as TINMARSH.—p. 231.

The defendant's name was Tidmarsh; he was arrested as Tinmarsh:—The Court refused to set aside the writ, but left him to plead.

MR. Serjeant Vaughan applied for a rule calling on the plaintiff to show cause why the writ issued in this cause and all subsequent proceedings thereon, should not be set aside for irregularity, and why the bail-bond given by the defendant on his arrest should not be delivered up to be cancelled. The alleged irregularity was, that the defendant, whose name was Tidmarsh, had been arrested by the name of Tinmarsh. The learned Serjeant submitted that this was such a misnomer as would warrant the summary interference of the Court, and that the present case was clearly to be distinguished from that of *Ahitbol v. Beniditto*, 2 Taunt. 401, where the defendant having been arrested by the name of Benedetto, the Court, on a similar application to this, refused to interfere, on the ground that the names were idem sonantes.

Per Curiam. Let the defendant plead the misnomer in abatement.

The learned Serjeant took nothing. (a)

(a) See also *Stockdale v. Blenkins*, 1 Price, 277.

COLLINS and Another v. WALLIS.—p. 248.

An affidavit of debt stated that the plaintiffs had furnished goods to the amount of 2000*l.* to one N., for whom the defendant undertook to be answerable; that N. had since failed, and paid a dividend of four shillings in the pound only; and that 1600*l.* remained due to the plaintiffs:—Held sufficient.

MR. Serjeant Wilde moved for a rule calling on the plaintiffs to show cause why the bail-bond, which had been given by the defendant in this case, should not be delivered up to be cancelled, on the ground that he had been arrested and held to bail for unliquidated damages. The affidavit of debt stated, that the defendant had applied to the plaintiffs to furnish coals to the amount of 2000*l.* and upwards to one Nicholls, for whom the defendant undertook to be answerable; that Nicholls had since failed, and paid a dividend of *four shillings* in the pound only; whereby a sum of 1600*l.* remained due to the plaintiffs. The learned Serjeant contended, that, as the defendant was, at all events, only collaterally liable, and as the damages were unliquidated until assessed by a Jury, the defendant could not legally be held to bail.

Per Curiam. To constitute a case of unliquidated damages, the debt must be of such a nature that its amount cannot be ascertained but by the intervention of

a Jury. That is not the case here. The amount due to the plaintiffs on the defendant's undertaking, is as clearly ascertainable as if the goods had been delivered to the defendant himself. Rule refused. (a)

(a) See *Cope v. Joseph*, 9 Price, 135.

KINDERLEY, Demandant; GRAHAM, Tenant; OGLE, Vouches.—p. 249.

The Court permitted a recovery to be amended by substituting "the township of A., in the parish of K.," for "the parish of A."

CASES IN EASTER TERM,

7 GEO. IV.—1826.

BOWLES, Demandant; LAWRENCE, Tenant.—p. 338.

A writ of entry was returnable, and an appearance entered thereon, in Michaelmas Term. The count was entitled of Hilary Term, and was delivered on the 10th February. The Court set aside the count, for irregularity, and refused to allow it to be amended.

ODDIE, Demandant; FOSTER, Tenant; Earl of PLYMOUTH, Vouches.—p. 340.

The Court refused to allow a recovery to be amended by the insertion in the præcipe, of a description of the parcels intended to pass, which had been omitted by mistake.

CHERRINGTON and Another, Assignees of SAMWELL, a Bankrupt, v. BROWN and Another.—p. 341.

A creditor called upon the bankrupt by appointment. The bankrupt left the room and did not return, and the wife told the creditor that he had gone out:—Held, that this was sufficient evidence to warrant the Jury in inferring that the bankrupt left his house with intent to avoid a creditor.

WILLIAMS, Gent., One, &c., v. GOODWIN the Elder.—p. 342.

The defendant employed the plaintiff, an attorney, to conduct a suit for his son. On the trial of that cause, the attorney called the defendant as a witness, and, lest he should be objected to as incompetent, by reason of interest, he prepared a release:—Held, that the conduct of the plaintiff was a fraud upon the Court, and that he was not entitled to recover.

THIS was an action of assumpsit, for an attorney's bill. At the trial, before Lord Chief Justice Best, at the sittings at Westminster, after the last Term, it appeared that the costs in question were incurred in the carrying on of an action

DOE d. SMYTHE v. CLAXTON.—p. 347.

The attesting witness to a deed stated, that he knew the defendant, one of the parties, that the attestation was in his (the witness's) handwriting, that he did not know whether or not the signature to the deed was the defendant's handwriting, but that he would not have put his name to it unless he had seen him execute it:—Held, sufficient proof of the execution.

THIS was an action of ejectment. At the trial before Mr. Justice Burrough, at the last assizes at Exeter, a deed, purporting to be a deed made between the lessor of the plaintiff and the defendant, was offered as evidence. The attesting witness, who was called to prove the execution of the deed by the defendant, stated that the attestation at the foot of the deed was in his handwriting; that he knew the defendant; that he did not know whether the signature to the deed was in the defendant's handwriting or not; but that he (the witness) would not have put his name to it unless he had seen it executed by him.

The learned judge was of opinion that the proof of the execution of the deed by the defendant was sufficient. The jury returned a verdict for the lessor of the plaintiff.

Mr. Serjeant *Wilde* now moved for a rule nisi, that this verdict might be set aside, and a nonsuit entered. He submitted, that, as the handwriting of the defendant to the deed was not identified by the witness, and as he was ignorant of the contents of the instrument, and therefore could not state with certainty that the deed in question was that attested by him, there was no sufficient proof of its execution by the defendant.

Per Curiam. The attesting witness stated that he knew the defendant, by whom the deed was executed; and, though he said that he did not know whether the signature of the deed was in the handwriting of the defendant or not, still, as he said that he would not have put his name to it unless he had seen the defendant execute it, we think the execution proved. Rule refused.

ISAACS v. SILVER.—p. 348.

The defendant was held to bail on a bill of exchange. The Court refused to order the bail-bond to be delivered up to be cancelled, on an affidavit that the bill was founded and given on an usurious transaction.

THE defendant in this cause having been arrested at the suit of the endorsee of a bill of exchange, of which he, the defendant, was the endorser, and having given a bail-bond—

Mr. Serjeant *Lawes* moved for a rule nisi, that the bail-bond might be delivered up to be cancelled, on the defendant's entering a common appearance, on an affidavit which stated that the bill was founded and given on an usurious transaction. The learned Serjeant cited the case of *Wightwick v. Banks*, Forrest, 153; where the Court of Exchequer held, that if there be probable ground to suspect that the securities on which a defendant is held to bail are illegal, it is a ground for discharging him, on filing common bail.

Per Curiam. The Court cannot receive an affidavit in contradiction to that filed by the plaintiff on the issuing of a writ. The case of *Wightwick v. Banks* cannot be supported. Rule refused.

HORNBY, Administratrix, &c., v. BOWLING.—p. 369.

A plaintiff may proceed by *distringas* to compel the appearance of a defendant who resides abroad, but carries on trade in this country.

ROWLEY v. BAYLEY.—p. 383

An affidavit to hold to bail, stating that the defendant is indebted "for goods sold and delivered by the plaintiff to the defendant," is sufficient, though it omit to add "at his request."

MR. Serjeant *Wilde* moved for a rule calling on the plaintiff to show cause why the sum of 226*l.* which had been deposited by the defendant in the hands of the Sheriff of Middlesex, in lieu of special bail, should not be returned to him, on the ground of the insufficiency of the affidavit to hold to bail, in which the plaintiff swore that the defendant was indebted to him in the sum of 226*l.* "for goods sold and delivered by the plaintiff to the defendant," omitting to add, "at his request." The learned Serjeant relied upon the case of *Durnford v. Messiter*, 5 *Mau. & Selw.* 446; where it was held, that an affidavit to hold to bail, "for money lent, and for goods sold and delivered, and for work and labour," is irregular, if it omit to state that it was "at the instance and request of the defendant," although it stated that it was "to and for his use, and on his behalf."

LORD Chief Justice BEST. There is no foundation for this application. The decision of the court of King's Bench in *Durnford v. Messiter*, was considered in this court in the case of *Berry v. Fernandez*, 8 *B. Moore*, 332; *S. C.* 1 *Bing.* 338; where it was held, that an affidavit of debt for money paid for a defendant, and advanced to him, need not state that the payment and advance were at the defendant's request. Mr. Justice Park rightly observed in that case, that, "very frequently, where money is received by the defendant to the plaintiff's use, it is only a conclusion resulting from the construction which the plaintiff, swearing to the best of his judgment, puts upon a transaction, from which he conceives a debt to result; but no request is in fact made by the defendant, but generally arises by implication of law." Where a tradesman delivers goods, an affidavit may clearly be sufficient without expressly stating them to have been delivered at the request of the vendee; that such is the fact, is a necessary inference. Were this not so, there would be few cases wherein a defendant could be held to bail at all for a debt contracted in the purchase of goods.

Rule refused.(a)

(a) In *Eyre v. Hulton* (5 *Taunt.* 704; *S. C.* *nomine Hulton v. Eyre*, 1 *Marsh.* 315), an affidavit to hold to bail, stating that the defendant was indebted "for money paid by the plaintiff for the use of the defendant," without adding that it was paid "at his request," was held sufficient. So, also, "for work and labour done by the plaintiff for the defendant, as his servant," not stating that it was done "at his request" or "on his retainer." *Bliss v. Atkins*, 5 *Taunt.* 756, *S. C.* 1 *Marsh.* 317, n.

BAILEY and Another v. BEAUMONT.—p. 384.

The court will not allow the venue to be changed after plea pleaded, unless the justice of the case clearly requires it.

DORRINGTON v. BRICKNELL.—p. 445.

In debt on a bail-bond, the declaration need not contain averments that there was an affidavit of debt, or that the sum sworn to was endorsed on the writ.

CASES IN TRINITY TERM,

7 GEO. IV.—1826.

GARNER v. WELLER.—p. 457.

The Court refused to set aside a declaration, on the ground of a variance between the writ and declaration—the defendant being called *John* in the former, and *James* in the latter.

MR. Serjeant *Peake*, on the part of the defendant, applied for a rule, calling on the plaintiff to show cause why the declaration in this cause should not be set aside, for irregularity. The irregularity complained of was, that, in the writ, the defendant was described as *John Weller*, and in the declaration, as *James*, the latter being his real name.

Per Curiam. In the case of *Spalding v. Mure*, 6 Term Rep. 363, the Court of King's Bench refused to set aside the proceedings for irregularity, on account of a variance between the original writ and the declaration. Formerly, the variance might have been the subject of a plea in abatement to the writ, but now it is otherwise, for in the case of *Peake v. Davis*, 5 Taunt. 653, n., this Court held, that a defendant cannot plead in abatement to the original writ, as he cannot have over. (a) The like practice prevails in the Court of King's Bench, according to the case of *Spalding v. Mure*; and it is a very beneficial practice, for it tends in a great measure to get rid of pleas in abatement, the only use of which is, to retard and obstruct the proper course of justice.

The learned Serjeant, therefore, took nothing by his motion. (b)

(a) In *Murray v. Hubbard*, 1 Bos. & Pul. 635, the defendant, being arrested by the name of F. H., put in bail by the name of S. H. The plaintiff declared against him as "S. H. arrested by the name of F. H." The defendant pleaded the *misnomer* in abatement of the writ. The plaintiff treated the plea as a nullity and signed judgment. This Court refused to set aside that judgment.

See also *Symmers v. Wason*, 1 Bos. & Pul. 105.

But see the case of *Wade v. Stiff*, 1 Moore & Payne, 26, where, in trespass against four defendants, one of them pleaded a *misnomer* in abatement of the writ; and the Court, on demurrer, held the plea to be ill, because it concluded with a prayer of judgment "of the writ, and that the same might be quashed, &c."—the *misnomer* of one defendant being no ground to abate the writ as against all: but it was not hinted, either by the Court or by counsel, that such a plea could not be pleaded at all; though the reason given above in the text, why it should not be allowed, seems very satisfactory.

(b) See the case of *Turing v. Jones*, 5 Term Rep. 402, where the Court of King's Bench, on motion, refused to permit the defendant to take advantage of a variance between the sum mentioned in the *ac etiam* part of the writ and the declaration.

Where a party held to bail obtains time to put in bail to the action, he cannot afterwards object to the writ for irregularity. *Moore v. Stockwell*, 6 Barn. & Cress. 76.

If the christian name of the defendant is omitted in the writ, the Court of King's Bench will, if the process be *bailable*, set aside the proceedings, on motion; but, if it be *serviceable* only, they will not interfere on motion, but leave the defendant to plead in abatement. *Rolph v. Peckham*, 6 Barn. & Cress. 164.

The reason of this distinction between *bailable* and *serviceable* process is, that, in the former, the interests of third parties, viz. the bail, are involved. On the same principle, the Courts will not allow amendments in *bailable*, which would be permitted in *serviceable* process. See the cases of *Phillips v. Tanner*, 6 Bing. 237, *S. C.* 3 Moore and Payne, and *Houlder v. Fasson*, 3 Moore & Payne.

DONATTY v. CROWTHER and KELLY, Sheriffs of London.—p. 479.

A mare having been placed with a livery stable-keeper, who advanced money to the owner; it was agreed that she should remain as a security for the repayment of the sum advanced, and for the expenses of her keep:—Held, that the stable-keeper had a lien on the mare.

THIS was an action of trover for the conversion of a mare, saddle, and bridle, and brought under the following circumstances:—

In the beginning of February last, a writ of fieri facias, returnable on the 12th of April, was sued out, and directed to the defendants, who were the sheriffs of London, against the goods of one Richard Cuttill, for 59*l.*, at the suit of one James Mills; on the return-day, the officer learned that a mare belonging to Cuttill had been advertised for sale, and was then standing at livery at the plaintiff's stables. The officer accordingly went there, and on being informed that the mare was Cuttill's property, he seized and removed her, and she was ultimately sold, and the proceeds of the sale handed over to Mills.

At the trial before Mr. Justice Gaselee, at Westminster, at the Sittings after the last term, it appeared that the mare had been placed under the care of the plaintiff, a livery stable-keeper, by Cuttill, who being in want of money, had borrowed from the plaintiff 10*l.* at one time and 20*l.* at another; and it was afterwards agreed between them that the mare should stand at the plaintiff's stables as a security for such advances; and that, if necessary, she should be sold by the plaintiff, under Cuttill's directions as to the price; and that the plaintiff was to repay himself all the expenses of her keep, and the sums advanced, out of the proceeds of such sale.

The jury found a verdict for the plaintiff, damages 39*l.*, being the value of the mare, saddle, and bridle; but leave was reserved to the defendants to move to reduce them to one shilling, as nominal damages for the saddle and bridle, in case the Court should be of opinion that the plaintiff was not entitled to recover for the mare.

Mr. Serjeant *Lawes* now applied for a rule nisi accordingly, and submitted, that this action could not be maintained—*First*, the plaintiff, being a livery stable-keeper, had no lien on the mare; for, in *Yorke v. Grenaugh*, Lord Chief Justice Holt took the distinction between an innkeeper, and a livery stable-keeper; and said, (a) “that if a horse standing at livery be lost the liveryman shall be answerable, yet he cannot retain for the meat, but has a remedy upon the contract; for he is not compellable to receive such a horse.” (b) In *Hunter v. Barkley*, Esp. Ni. Pri. Dig. 2d edit. vol. 2, 584, Lord Kenyon held, that a *livery stable-keeper* had no privilege to detain a horse for his keep; for that is allowed to innkeepers, on the ground of their being obliged to receive guests and their horses; but that that is not the case with livery stable-keepers, who rely on the contract. Or even if there had been a right of lien in this case, it was waived by the special agreement between the parties; *Breman v. Currint*, Sayer, 224. If the bailee of property contract for a specified price for his labour or service, he loses all claim to a lien which he may previously have had; the same rule will apply to a horse, if any specified terms as to its remaining in the custody of the stable-keeper were agreed on at the time it was left at livery. *Secondly*, even admitting that the agreement that the mare was to stand at the stable as a security for money advanced, might create a claim to a lien, still trover is not the proper form of action, inasmuch as it was not brought against the owner, who was named in the writ, and who, if he had removed the mare against the plaintiff's right of lien, would have been liable to an action of trover; but against the Sheriffs, who acted under legal process, and whose only duty it was to ascertain that the property in the mare was in the party against whom the writ was sued out at the time it was executed; for, if the plaintiff had brought trespass against the defendants, they might have justified under the writ. If, therefore, the plaintiff had any remedy, it was by an action on the case against the defendants as Sheriffs, for improperly taking property out of his possession, over which he had a lien;

(a) 2 Ld. Raym. 868.

(b) In *Bevan v. Waters* (Trinity Term, 1828), 3 Carr. & Payne, 520, S. C. 1 Mood. & Malk. 235, it was decided, by Lord Chief Justice Best, that, though in the general case of a livery stable-keeper, there is no lien; yet, that a man who has a horse *for training*, has a lien for the keep and exercise of it. See also *Wallace v. Woodgate* (Michaelmas Term, 1824), 1 Carr. & Payne, 575, S. C. 1 Ryan & Mood. 193, where Lord Chief Justice Best told the Jury “that a livery stable-keeper had not, by law, a lien for the keep of horses, *unless by special agreement with the owner of them* ;” and see *Jacobs v. Latour* (Trinity Term, 1828), 2 Moore & Payne, 201; S. C. 5 Bingh. 130.

the defendants had only to show that the property in the mare was in Cuttill, against whom they were bound to execute the writ; they were, therefore, justified in making the seizure, notwithstanding any agreement between Cuttill and the plaintiff, who had no general right of lien, or, even if he had, he had waived it by the special agreement.

Lord Chief Justice BEST. The plaintiff had a *bonâ fide* lien on the mare, which was pledged to him by Cuttill as a security for two several sums of money advanced to him by the plaintiff; and the mare was to be sold, and the plaintiff was to repay himself such advances, and also the expenses of her keep, in case they were not liquidated in any other manner. This is a case of personal property, not distinguishable in principle from that of a mortgage; and it has been decided, that a mortgagor of real property, though he cannot maintain ejectment, may maintain trespass against any wrongdoer except the mortgagee; and where trespass will lie for the possessor of real property, trover may be maintained by the possessor of personalty. In *Gordon v. Harper*, 7 T. R. 9, it was held, that trover may be maintained by any person having both the right of possession and the right of property; and in this case the plaintiff had evidently both these rights as against the true owner of the mare, and had he taken her away from his stables, without first satisfying his demands, the plaintiff would have had a clear right of action against him, but the defendants, as Sheriffs, took the mare as being the property of Cuttill, the owner; therefore, if he could not have removed her from the plaintiff's stable without satisfying his demands, neither could they—for they cannot put themselves in a better situation than the owner himself.

Mr. Justice PARK. If there had been any fraud between the plaintiff and his debtor Cuttill, there would have been great weight in the argument adduced by my brother *Laws*. It is admitted, that this is not a common case of lien. Although the mare was not merely pledged for the repayment of money, as in the case of goods pledged with a pawnbroker; yet the case is, under all its circumstances, *idem per idem*; and I consider the case of *Gordon v. Harper* to be in point, to show that the plaintiff had a sufficient property in the mare to entitle him to maintain this action.

Mr. Justice BURROUGH. Nothing but an absolute tender of the sums advanced, and the expenses of the mare's keep, could have restored the right of possession to the original owner; and, as long as she remained in the plaintiff's custody, he had a right of action against all the world, and even against the owner himself, if he had removed her without paying the sums advanced, as well as the charges for her keep.

Mr. Justice GASELEE concurred.

Rule refused.

M'ALLEN v. CHURCHILL.—p. 483.

In assumpsit for the breach of an agreement, a clause contained therein, although illegal, as being in restraint of trade, if it form no part of the consideration, need not be set out in the declaration.

THIS was an action of assumpsit for the breach of an agreement. The declaration stated, that, by an agreement between the plaintiff and defendant, the latter agreed to assign his interest in a lease of a public-house, to the former, for the term of thirty-one years, at the yearly rent of 100*l.*; that the plaintiff was to pay all taxes, and repair the premises, and take the fixtures and stock in trade at a valuation; and that the defendant was to pay all arrears of taxes up to the date of the agreement; that the plaintiff agreed to purchase the defendant's interest in the lease, and pay for the fixtures on these terms; and that he deposited 800*l.* in part of the purchase-money. The declaration then averred mutual pro-

mises. Breach—that the defendant had no right to assign the lease in question, nor had he any title to the premises agreed to be assigned, before or after the agreement was entered into. The defendant pleaded the general issue.

At the trial, before Lord Chief Justice Best, at Guildhall, at the sittings after the last term, it appeared on the face of the agreement, that it contained a clause (not set out in the declaration), whereby the defendant agreed, that he would not, directly or indirectly, take, occupy, or carry on the business of a publican or victualler within five years from the time of making the agreement. The jury found a verdict for the plaintiff, on the ground that the defendant had no right or title to assign the premises.

Mr. Serjeant *Vaughan* now applied for a rule nisi, that this verdict might be set aside and a new trial granted, or a nonsuit entered, on the ground that the whole of the consideration had not been set out in the declaration; and that the clause omitted, being an essential part of the consideration for which the house was to be assigned to the plaintiff, it vitiated the whole agreement, inasmuch as it was in general restraint of trade, and therefore illegal. *Hunlocke v. Blacklowe*, 2 Wms. Saund. 156, n. 1.

Lord Chief Justice BEST. This objection as to the clause forming part of the consideration was not raised at the trial. It was merely contended that as the clause restrained the defendant from carrying on a business anywhere, it was illegal. The question of variance between the agreement and the declaration was not raised. But are we to say that every agreement is wholly bad, because it may happen to contain an illegal clause? In setting out a contract in a declaration of assumpsit, it is only necessary to state so much of it as contains the entire consideration for the act, and the entire act which is to be done in virtue of such consideration, (a) and it appears to me, that the consideration in this case was sufficiently stated: the clause in question is a superadded or independent clause; it is a sort of rider, forming no essential part of the consideration. I therefore think that there is no ground to disturb the verdict.

The rest of the Court concurring—

Rule refused.

(a) See *Clarke v. Gray*, 6 East, 564.

SIMMONS, and Three Others, Vouches.—p. 485.

If one of several vouches appear personally in court, and the others by attorney, the name of the former need not be inserted in the dedimus, or warrant of attorney.

HAWKER, Deforciant.—p. 485.

Where premises were described in a fine to be in the parish of A., whereas, they were in fact in the parish of B., being in a certain street, part of which was in A., and part in B.; and the deed to lead the uses stated the premises to be in that street, in the parish of A. The Court, on an affidavit of the facts, allowed the fine to be amended, by altering the name of the parish from A. to B.

WALKER, Clerk, v. RIDGWAY.—p. 486.

In an action by a clergyman against a farmer, for improperly setting out his tithes, the jury found a verdict for the defendant, contrary to the opinion of the Judge. The Court directed a new trial; and anonymous letters having been inserted in the newspapers of the county where the cause was tried, reflecting on the character of the plaintiff, as a clergyman:—the Court ordered the venue to be changed to a third county.

GOODTITLE, on the demise of HARRIET GREEN, v. NOTITLE.—p. 491.

Where by a mortgage-deed, the principal sum was advanced by the mortgagee to the mortgagor, for three years from the date of the deed, the interest to be payable quarterly, and the deed contained a proviso, that, if default should be made in payment of interest on any of the days appointed for the same, the mortgagee might sell the premises assigned:—the mortgagor having made default in the payment of one quarter's interest, the mortgagee brought ejectment, the Court refused to stay the proceedings on payment of the arrears of interest, and costs, by the mortgagor, as the case did not fall within the provisions of the statute 7 Geo. 2, c. 20, as the principal sum became payable on default of payment of the interest.

THIS was an action of ejectment, brought by the lessor of the plaintiff, as mortgagee, to recover certain premises in the possession of the mortgagor.

On a former day in this term, Mr. Serjeant *Wilde* obtained a rule calling on the lessor of the plaintiff to show cause, why, on payment to her by the mortgagor of the arrears of interest due, and the costs of the action, and of this application, all further proceedings in the cause should not be stayed. The application was founded on affidavits, which stated that, in March 1824, the lessor of the plaintiff had advanced to the mortgagor the sum of 300*l.* for three years; the interest to be payable quarterly; that the interest had been duly paid up to the 17th of September last, and that shortly after the 17th of December, the mortgagor was called on to pay one quarter's interest, due on that day, and which not having been complied with, the present action was commenced. Under these circumstances, the learned Serjeant submitted, that, upon payment by the mortgagor of all arrears of interest and costs, the Court would exercise the equitable jurisdiction afforded them by the statute 7 Geo. 2, c. 20, s. 1, and stay the proceedings on the terms as prayed.

Mr. Serjeant *Vaughan* was now about to show cause; when the Court ordered the mortgage-deed to be produced, which bore date the 17th March, 1824, and contained a proviso for redemption in the following terms:—

“Provided always, and it is hereby agreed and declared by and between the mortgagor and mortgagee, that if the mortgagor, his heirs, &c., do and shall on the 17th of March, *which will be in the year of our Lord* 1827, well and truly pay or cause to be paid unto the mortgagee, her executors, &c., the sum of 300*l.*, with such interest for the same, to the day of payment, as shall then be due thereon; and do and shall in the mean time, and until such payment of the said sum of 300*l.* well and truly pay, or cause to be paid unto the mortgagee, her executors, &c., interest for the said sum of 300*l.* after the rate of 5*l.* per cent. per annum from the day of the date of these presents, by equal quarterly payments on the 17th of June, the 17th of September, the 17th of December, and the 17th of March, in each and every year, and make the first quarterly payment thereof on the 17th of June now next ensuing; and do and shall make such respective payments, without any deduction or abatement whatsoever, then the mortgagee, her executors, &c., shall and will at the request and at the expense of the mortgagor, his executors, &c., release, assign, or otherwise dispose of the premises by the deed respectively assigned and demised to the mortgagor, his executors, &c., free from all encumbrances, &c.; *Provided also*, and it is hereby further agreed and declared, that in case default shall be made by the mortgagor, his executors, &c., in payment of the said sum of 300*l.*, or any part thereof, as aforesaid, or if default shall be made by him or them in payment of the interest on the said sum of 300*l.*, or any part thereof, on any of the days or times hereinbefore mentioned or appointed for payment of the same respectively;—in either of the said cases, *it shall and may be lawful for the mortgagee*, her executors, &c., absolutely to sell, assign, or dispose of the premises so assigned and demised by these presents, either altogether or in parcels, by public auction or private contract, &c.”

By a subsequent clause, the proceeds of the sale were to be vested in the mortgagee, her executors, &c., upon trust, to pay the expenses of such sale; and, in the next place, upon trust to retain and pay unto the mortgagee, her executors, &c., the said sum of 300*l.* and all interest for the same, or so much thereof

respectively as should *then* remain *due and owing*, and to pay over the surplus, if any, to the mortgagor, his executors, &c.

The Court now called on Mr. Serjeant *Wilde* to support his rule. Before the statute 7 Geo. 2, c. 20, was passed, it was customary for the Courts to stay the proceedings in ejectment by the mortgagee, after the day of payment, on payment to the lessor, or bringing into Court, principal, interest, and costs; (a) and, by the 1st section of that statute, it is enacted, that "where any action of ejectment shall be brought by any mortgagee, &c., for the recovery of mortgaged land, if the person having a right to redeem such land, shall, at any time pending such action, pay unto such mortgagee, or, in case of his refusal, shall bring into Court, all the principal moneys and interest due on such mortgage, and also all costs, to be ascertained by the Court, or proper officer appointed for that purpose; the moneys so paid or brought into Court shall be deemed and taken to be in full satisfaction and discharge of such mortgage, and the Court shall and may discharge the mortgagor of and from the same accordingly."

Although this statute may not be strictly applicable to the present case, inasmuch as, by the terms of the deed, the mortgagee is empowered to sell the mortgaged premises on default of payment of a quarter's interest on the day on which it shall become due; yet, as a Court of equity would probably relieve the mortgagor on the terms now prayed, and this Court has, by the statute, an equitable jurisdiction in such cases, they will prevent the interference of a Court of equity, by allowing the proceedings to be stayed, on the usual terms; and thus justice will be effectually done between the litigant parties, without putting them to unnecessary expense and delay.

Lord Chief Justice BEST. We should be most happy to relieve the mortgagor, if we felt ourselves empowered so to do; for we consider the present action to be exceedingly vexatious: but we are bound to regulate our proceedings by the rules of law. The only question therefore is, whether this case falls within the terms of the statute 7 Geo. 2; if it does not, we are not at liberty to stay the proceedings in the action on equitable considerations, to the detriment of a legal right. If we were possessed of such a power, we might save the parties the expense of a suit in equity, in many instances; but as our authority in this case is derived solely from that statute, we cannot interfere unless the parties stand expressly within its terms and operation. By the 1st section, if the person having the right to redeem shall, at any time pending the action, pay to the mortgagee, or bring into Court, *all the principal moneys and interest due on the mortgage* with costs, the Court may discharge the mortgagor. It is clear, we have no jurisdiction unless *all that is due* is paid to the mortgagee, or brought into Court; and if the mortgagor had done so in this case, he might have brought himself within the equity of the statute; but he has not done so; for, although by the terms of the proviso for redemption, the principal was not payable till March 1827, yet there was another condition annexed, viz. that the interest should be paid to the mortgagee quarterly; and that, in case *default* should be made *in payment of the interest*, or any part thereof, on any of the days respectively appointed for payment of the same, *then* the mortgagee had an absolute right to re-enter, and, by the sale of the premises, to pay herself *the said sum of 300*l.* and so much of the interest as was then due*, paying over the surplus to the mortgagor. On default therefore of the payment of a quarter's interest by the mortgagor, the principal became in the nature of an immediate debt to the mortgagee; and without the payment of that debt, I do not see how even a Court of equity could relieve the mortgagor; and certainly, if equity could not, this Court cannot interfere. If a mortgagor stipulate to pay interest under such conditions, and fail to do so, we cannot relieve him from the consequences of his default, or substitute a new agreement for him. The case is similar to that of a warrant of attorney, payable by instalments; where, if default be made in the payment of one, the party to whom it is given may enter up

(a) Anonymous, 1 Str. 413.

judgment, and sue out execution for the whole. It is certainly a hard case on the mortgagor, and we would assist him if it were in our power, but he must be bound by his own deed.

Mr. Justice PARK. The parties in this case came before me at Chambers, but the deed was not then produced. I was strongly disposed to relieve the mortgagor, but I thought I had no jurisdiction under the statute 7 Geo. 2; and therefore refused to interfere to stay the proceedings, except on payment of the principal, interest, and costs. There are two provisos in the mortgage-deed: the first postpones the time of payment of the principal till March, 1827; but the second proviso, by giving the mortgagee a power to sell immediately on default of payment of one quarter's interest, virtually makes the principal payable instantaneously upon such default; and this latter proviso seems to me to tie up the hands of a Court of equity, as effectually as it does ours.

Mr. Justice BURBOUGH. The terms of the proviso in this deed at first created some difficulty in my mind; but I have now no doubt upon the subject: the question is, whether the principal is due or not;—if it be due, then we cannot relieve the mortgagor under the statute 7 Geo. 2, without payment of it by him to the mortgagee. By the default of payment of a quarter's interest, on the day appointed by the deed, I think the principal is due; and therefore it is out of our power to relieve the mortgagor.

Mr. Justice GASELEE. It is not necessary for us to consider what we might have done if the principal had not been due, as, from the terms of the mortgage-deed, it clearly appears to be due. If this case does not come within the terms of the statute, we have no authority to stay proceedings on equitable principles: therefore, this application cannot be acceded to. If the mortgagor had enlarged the terms of his motion to the payment of principal, interest, and costs, it would have been a very different question.

Rule discharged.

BAYLEY and Another v. BEAUMONT.—p. 497.

A plaintiff will not be allowed his expenses in the construction of a model, nor a compensation for loss of time to scientific persons, who had been sent to a distant part of the country to inspect a building there, although he could not safely have proceeded to trial without their testimony.

Mr. Serjeant *Vaughan* applied for a rule nisi, that the Prothonotary might review his taxation in this cause, on the ground of his not having allowed the plaintiffs their charges attending the making of a model of a conservatory (for the erection of which this action was brought), as well as a compensation for loss of time to scientific persons, who were sent by the plaintiffs to York, to examine the conservatory, as, without such examination, they could not have safely proceeded to trial. Although in *Severn v. Olive*, 6 B. Moore, 235, where the Prothonotary, on taxation, had allowed for various sums expended in experiments, and a compensation for loss of time to scientific men employed in making them, and who were called as witnesses at the trial, the Court directed him to review his taxation, on the ground that no such allowance or compensation ought to have been made; yet there, the Prothonotary had allowed a compensation to the witnesses for the loss of their time in making these experiments; whilst, in the present case, the application was confined to a compensation for the loss of the witnesses' time, during their journey from London to York, and the Prothonotary had only allowed the actual expenses of the journey. In *Lopes v. De Tastet*, 7 B. Moore, 120, cited in *Severn v. Olive*, 6 B. Moore, 239, 240, a witness who was the captain of a foreign vessel, was allowed a liberal compensation for the loss of a voyage by him, and for the time he was detained in this country, before the trial took place; and here the witnesses should have been allowed a compensation for the loss of their time during their journey to York, for th

purpose of examining the structure and materials of the conservatory, as, without their testimony, the jury could not have ascertained what damages the plaintiffs might have been entitled to recover.

Lord Chief Justice BEST. It is impossible to distinguish this case from the principle laid down in *Severn v. Olive*, where it was expressly decided, that scientific men were not entitled to any compensation for loss of time; and Lord Chief Justice Dallas observed, that such allowance was confined to medical men and attorneys only. So, in *Moor v. Adam*, 5 Man. & Selw. 156, the same point was decided; which case was confirmed, and even carried further in *Willis v. Peckham*, 4 B. Moore, 300, where it was held, that a witness attending a trial under a subpoena was not entitled to a compensation for loss of time, although the party requiring his attendance had expressly promised to pay him for such loss.

The rest of the Court concurring—

Rule refused.

HATTON and Another, Assignees of MOSS, a Bankrupt, v. BRISTOW.—
p. 504.

It is sufficient if an affidavit of debt, made by one of the assignees of a bankrupt, state that the defendant is indebted, &c., *as appears by the books of the bankrupt, and as the deponent verily believes*; without alleging that the books are in the deponent's possession.

MR. Serjeant *Wilde* applied for a rule nisi, that the defendant might be discharged out of custody on entering a common appearance, on the ground of the insufficiency of the affidavit to hold to bail, under which he had been arrested; and which stated that "the defendant was indebted to the deponent and the co-plaintiff, as assignees of Moss, a bankrupt, for goods sold and delivered by Moss, before he became bankrupt, to the defendant, and at his request, as appeared by the books of the bankrupt, and as the deponent verily believed." The learned Serjeant contended that this was insufficient, and referred to Tidd's Appendix, page 85, s. 93, 9th edit., to show that the affidavit should have stated the books to be in the deponent's possession; but—

Lord Chief Justice BEST cited the case of *Swayne v. Crammond*, 4 Term Rep. 176, as being expressly in point.

Rule refused.

CLEMENTS v. GEORGE.—p. 510.

SAME v. SAME.

The statute 24 Geo. 2, c. 18, s. 1, whereby the Judge, by certifying that the cause was a proper one to be tried by a special jury, may relieve the party applying for such special jury from the expenses, does not extend to a case where the record is withdrawn.

SHAW v. RUSSELL.—p. 540.

The Court will not allow inconsistent pleas to be pleaded together, unless, at the time of the application for leave to plead several matters, an affidavit be made, that such pleas are necessary for the justice of the case.

THIS was an action of debt on an arbitration bond.

Mr. Serjeant *Adams* having, on a former day, obtained a rule nisi to plead several matters, viz.—First, that there was no such award as that set out in the declaration;—secondly, that there was no bond of arbitration duly executed between the parties;—thirdly, performance of the award by the defendant by the delivery of a certain machine to the plaintiff, within the time limited by the arbitrator for that purpose:—and fourthly, performance of the award within the period stated by the arbitrator:

Mr. Serjeant *Vaughan* now showed cause, and submitted that these pleas were inconsistent; inasmuch as the two former went wholly to deny the award, and the authority under which the arbitrator acted; and the two latter, to establish the award by asserting performance of it.

Lord Chief Justice BARR. One of these pleas must certainly be struck out; it is putting the plaintiff to a most unnecessary expense to bring up a witness to prove the execution of the arbitration bond, when, by the two last pleas, such bond is fully admitted; as the defendant has pleaded the performance of the award, which was made under and by virtue of the bond. This practice of pleading inconsistent pleas is most abominable; and it is time it should be put a stop to. We will therefore require, that, in future, pleas, which, on the face of them, are inconsistent with each other, shall not be filed, unless, at the time the rule for pleading several matters is applied for, an affidavit is made, showing that such pleas are necessary to further the justice of the case.

The rest of the Court concurring—

Rule absolute, on the defendant's consenting that the second plea should be struck out.

BUXTON and Others, Executors of BUXTON, v. NANCOLAS.—p. 552.

In a declaration of *assumpsit* by executors, in a count for money paid to and for the use of the defendant by their testator, B. B., it was alleged, that "the defendants being indebted, he the said B. B. promised to pay the said B. B.:"—Held, that the words "the said B. B." before "promised," might be considered as surplusage.

THIS was an action of *assumpsit*, by the plaintiffs, as executors of Benjamin Buxton, deceased.

The first count of the declaration was for 1200*l.* lent by the testator to the defendant.

The second count stated, that the defendant afterwards, and in the lifetime of the said Benjamin (the testator), to wit, on, &c., at, &c., aforesaid, was indebted to the said Benjamin, in the further sum of 1200*l.* for money by the said Benjamin, before that time, paid, laid out, and expended, to and for the use of the said defendant; and being so indebted, *he the said Benjamin*, in consideration thereof, afterwards, and in the lifetime of the said Benjamin, to wit, on, &c., at, &c., aforesaid, undertook and faithfully *promised the said Benjamin* to pay, &c.

The three following counts were for money had and received, for interest, and upon an account stated between the defendant and the testator, in the lifetime of the latter, and a promise to pay him accordingly.

The defendant demurred specially to the second count, and assigned for cause, that it was stated and alleged in and by that count, that *the said Benjamin*, in his lifetime undertook and faithfully *promised the said Benjamin* to pay him the said sum of money in that count mentioned, when the defendant should be thereunto requested. The plaintiffs joined in demurrer.

Mr. Serjeant *Onslow*, in support of the demurrer, contended, that the count in question was altogether absurd and unintelligible upon the face of it, inasmuch as it contained no promise by the defendant to pay, but a promise by the testator to pay himself.

Mr. Serjeant *Spankie*, *contra*, referred to Viner's Abridgment, Tit. *Nonsense*, A. pl. 3, where it is stated, that, "where a matter set forth is grammatically right, but absurd in the sense, and unintelligible, the Court cannot reject some words to make sense of the rest; but that, where a matter is nonsense, by being *contradictory* and *repugnant* to somewhat precedent, there the precedent matter, which is sense, shall not be defeated by the repugnancy which follows; but that which is contradictory shall be rejected: as, in ejectment, where the declaration is of a demise on the 2d of January, and that the defendant, *postea*, scilicet the 1st of January, ejected the plaintiff; here the scilicet may be rejected as being expressly contrary to the *postea*, and the precedent matter. Per Holt, C. J., in *Wyatt v. Aland*, 1 Salk. 824. And here, the words "the said Benjamin," after that of "indebted," may be struck out, being superfluous and unnecessary.

The Court being of opinion that the count was sufficient without those words:—

Judgment for the plaintiff.

REPORTS OF CASES
ARGUED AND DETERMINED
IN THE
COURT OF COMMON PLEAS,
AND
EXCHEQUER CHAMBER.

By JOHN BAYLEY MOORE,
Of the Inner Temple, Esq.

VOL. XII.

**Containing Cases from Michaelmas Term, 1826, to Trinity Term,
1827, both inclusive.**

CASES
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IN THE
COURTS OF COMMON PLEAS,
AND
EXCHEQUER CHAMBER,
IN
Michaelmas Term,
7 GEO. IV.—1826.

HINTON, Gent. One, &c., v. WARREN.—p. 31.

The plaintiff, an attorney, arrested the defendant for 100*l.*, the amount of a bill of costs delivered, and served him with a copy of the declaration. The defendant pleaded the general issue, on which issue was joined. At the trial, the amount of the bill was, by consent of the parties, referred to the prothonotary to be taxed, and he found that 60*l.* only was due, as the plaintiff had neglected to take out his certificate, for a part of the time during which the business was done :—Held, that the defendant was not entitled to his costs under the statute.

DOE, on the Demise of Lord KENSINGTON, v. BRINDLEY and Others.—p. 37.

Land was demised to the defendants, who covenanted in the lease to build and complete certain houses thereon, within a year ; and that, if they did not, the lease should be void. The houses not being completed within the specified period :—Held, that the forfeiture was not waived by the steward of the lessor having permitted the defendant to employ workmen in completing the houses, for a short period after such forfeiture.

THIS was an action of ejectment, and brought to recover the possession of a certain piece of land, demised by the lessor of the plaintiff to the defendants, situate at Kensington, in the county of Middlesex.

At the trial, before Lord Chief Justice Best, at Westminster, at the sittings after the last term, it appeared, that the defendants, who were brick-makers, had taken the land in question under a building lease ; in which they covenanted to erect, build, and complete a certain number of houses on the land demised, within twelve months from the 11th of October, 1824 (the date of the lease) ; and that, if the houses were not completed within that time, the lease should be void, and that it should be lawful for the lessor to re-enter. It also appeared that the defendants had lately become bankrupt. The surveyor for the lessor of the

plaintiff proved that none of the houses were finished on the 11th of October, 1825; but, he admitted, upon cross-examination, that, upon that day, the buildings were in progress, and that, subsequently, from day to day, the defendants went on with their work, in order to complete the houses; and that this was done with the knowledge of the agent or steward of the lessor of the plaintiff; which, it was submitted for the defendants, amounted to a waiver, on the part of the lessor of the plaintiff, of the forfeiture of the lease. But, his Lordship observed, that whether the assent of the steward amounted to a waiver or not, was a question of law; and, as he thought that there was no waiver, the jury, under his Lordship's direction, found a verdict for the plaintiff.

Mr. Serjeant *Vaughan* now applied for a rule, calling upon the lessor of the plaintiff to show cause why this verdict should not be set aside, and a new trial granted. The learned Serjeant contended, that, if the lessor meant to insist upon the forfeiture of the lease, he should have done so in the first instance; and that he had in law been guilty of a fraud, in permitting the defendants to continue their work upon the premises after the day upon which the forfeiture had attached. In *Doe d. Sheppard v. Allen*, 3 Taunt. 78, although it was held, that, if a lessee exercise a trade on the demised premises, by which his lease is forfeited, the landlord does not, by merely lying by, and witnessing the act for six years, waive the forfeiture; yet, Sir James Mansfield observed (*Ib.* 79):—"There was a circumstance which had not been adverted to: It was suggested, that a great deal of money had been laid out by the defendant, in altering and improving the premises; that was not merely a circumstance for the consideration of a court of equity, for if the plaintiff lay by, and saw the money laid out, it was a strong circumstance from which a jury might imply consent to the alteration." So, here, the defendants laid out money upon the premises in question after the forfeiture of the lease, with the knowledge of the lessor's agent or steward, which is equivalent to an assent of the lessor himself; and neither of them raised any objection to the progress of the work. At all events, whether such an assent might or might not be implied, was a question which ought to have been left to the jury.

Lord Chief Justice BEST. The questions, whether there had been a forfeiture of the lease by the defendants, or a waiver of the forfeiture by the assent of the lessor, were both questions of law. It was proved, that only the carcasses of two of the houses had been completed; that another house had been built in a very improper manner; and that only the sash-work of the windows had been placed in any of the houses. There was no evidence of any work having been done on the premises after the end of October 1825. There can be no doubt, but that there was a forfeiture, as the houses were to be completed on the 11th of that month; and the only question was—whether there was a waiver of the forfeiture by the lessor of the plaintiff? I think, under the circumstances, there was not; and, consequently, that there is no ground to disturb the verdict.

The rest of the Court concurring—

Rule refused.

PEARCE v. LODGE.—p. 50.

In trespass for taking and carrying away furze, the defendant pleaded the general issue, and several special pleas, in which he claimed a right to estovers from a common: Held, that under the general issue, he might give evidence of an exclusive right of possession: Held, also, that persons who had a right of common were competent witnesses for the defendant to prove that he was entitled to the exclusive possession of the land from which the furze was taken by the plaintiff.

THIS was an action of trespass for taking and carrying away divers cart-loads of furze, alleged to be the property of the plaintiff. The defendant pleaded the general issue, and several special pleas, in which he claimed a right to take the furze, as estovers, from a certain common, called Felton Common.

At the trial before Mr. Justice Gaselee, at the last assizes for the county of Somerset, the defendant, instead of limiting his claim to estovers, claimed an exclusive right of possession in the locus in quo; which was proved by several witnesses who also had a right of common upon Felton Common. The jury found a verdict for the defendant, but leave was reserved to the plaintiff, to move to set it aside, on the grounds that the defendant, having by his pleas limited his claim to estovers, could not extend it to an exclusive right of possession, under the general issue; and, also, that the evidence of the witnesses who had proved such right, was inadmissible, they being interested in the event of the cause.

Mr. Serjeant *Taddy* now applied accordingly for a rule to show cause why the verdict for the defendant should not be set aside, and a new trial granted; and renewed the objections taken at the trial. The learned Serjeant submitted, that, as the only claim which the defendant had by his pleas advanced, was that of common of estovers, the plaintiff was not prepared to rebut that of an exclusive right of possession. Had he been aware of the nature of the claim, he could have shown that the common was divided by annual perambulations into allotments, called Slaights; and that, when these divisions were made, they gave a right to the party to whom each was allotted, to have the exclusive enjoyment of such allotment till the succeeding year, but no longer. The plaintiff, therefore, would have been enabled to prove that the defendant's right to exclusive possession had expired, had he not been led by the special pleas to suppose, that the question with regard to estovers, was the only point in issue. He cited *Wilson v. Mackreth*, 3 Burr. 1824; *Anscomb v. Shore*, 1 Taunt. 261.

Lord Chief Justice BEST. This was an action of trespass, for carrying away the plaintiff's furze. The defendant pleaded, together with several special pleas, the general issue; and there can be no doubt but that under that plea, he might give evidence of his exclusive right of possession. It appears, that the common in question is a large tract of land, some parts of which remain open, whilst others are divided into certain portions; and that annual perambulations are made for the purpose of ascertaining and fixing the respective lines of separation of the various portions. The case of *Anscomb v. Shore* does not appear to me to apply. In that case, the plaintiff prescribed for common of pasture upon Hampton Common, for all cattle levant and couchant upon his ancient messuage, &c., as appurtenant thereto (we can therefore ascertain the nature of the right under which the plaintiff claimed), and he declared, that the defendant was bound, by reason of his occupation, to repair the fence of his close contiguous to the common, but that he permitted it to be ruinous, whereby the plaintiff's cattle escaped into the close, for defect of fences, and the plaintiff lost the use of them. At the trial, the plaintiff called four witnesses, parishioners of Hampton, who deposed, that all inhabitants in Hampton, paying church and poor-rates, had a right to turn their cattle upon the common. He was proceeding to call other witnesses, but they being inhabitants, the defendant objected that none of them were admissible, upon which the plaintiff submitted to a nonsuit. It was contended, for the plaintiff, that, though in a case where right of common was claimed by custom, these witnesses could not have been heard; yet that, where the claim was by prescription in right of a particular tenement, inasmuch as the record of the judgment could not be evidence for or against them in any action of their own, to which it was essential that both parties to the record must be the same, they were admissible witnesses; that the question merely was, whether the owner of the adjacent land, or the commoner, was to repair the hedge; and that, from the very nature of the interest, it could not lie upon the commoner to repair it. But the Court held, "that the question to be considered was, whether the commoners, having a common interest in the preservation of this hedge, could be competent witnesses for each other. It might be, that no one was bound to repair it. It might be, that a hay-ward was usually paid by the commoners, to keep their cattle on the common. But the production of this record would be evidence for another commoner, that the occupier of the adjacent land was bound to repair this fence. The commoner, therefore, would derive an advantage by

exonerating himself from the charge of maintaining a hay-ward, if he could throw on this defendant the charge of repairing the hedge; and, consequently, he was interested in the event of the suit, and properly rejected."

The principle, therefore, upon which that case was decided, was, that, by a verdict against the defendant, the commoners would be relieved; and, therefore, that they could not be competent witnesses, as they clearly had an interest to cast the burden of repairing the fences upon another party. But it is impossible that the record in this case could be adduced in evidence for any of the parties who were called for the defendant at the trial. It was an action of trespass; and, under the general issue, no evidence could be brought forward, which could in any way affect the rights of any persons, except those who were parties to the record: the issue was confined to the plaintiff and defendant, viz.: as to which of them had the right of possession of the locus in quo; being the portion of the common in which the alleged act of trespass was committed.

Mr. Justice PARK concurred.

Mr. Justice BURROUGH. The plaintiff should certainly have gone down to trial fully prepared to try the right of possession of the land in question. He was a trespasser in fact; for the right of the different commoners was ascertained yearly by perambulations made for the convenience of all parties. As to the other question, it was against the interest of any one commoner to give another an exclusive right of possessing any particular part of the common; as, before the division each commoner had a general right of common over the whole; and the right of possession of the locus in quo was proved to be exclusively in the defendant.

Mr. Justice GASELER. It appeared, at the trial, that the defendant's family for the last two or three generations, had exercised a right of cutting furze upon the spot in question: in this instance, however, the plaintiff cut it, and the defendant carried it away. It was open to the plaintiff to demur to the special pleas, if he had thought proper; but he went down to trial on the general issue; and there can be no ground for saying that exclusive right of possession may not be given in evidence under that plea, in an action of trespass. The defendant's right might have existed independently of the annual division; the perambulation did not confer a right, but merely pointed out that portion of the common to which each party might be entitled for the year in which such perambulation was made.

Rule refused.

RIPLEY v. THOMPSON and two Others.—p. 55.

In an action of *assumpsit* for goods sold and delivered, it appeared that the goods were sold by the plaintiff to A., who gave promissory notes for their value, which were dishonoured, and A. afterwards became insolvent; it appeared also that A. was in partnership with the defendants, and it was proposed to call him as a witness for the plaintiff, but his evidence was objected to by the defendants, without a release from them, and was rejected:—Held that A.'s evidence was properly rejected, on the ground of his being interested in procuring a verdict against the defendants, as in that case he would only be liable for a proportion of the debt.

THIS was an action of *assumpsit* for goods sold and delivered, brought to recover the sum of 550*l.*, being the value of four horses alleged to have been sold by the plaintiff to the defendants.

At the trial, before Lord Chief Justice Best, at Westminster, at the sittings after the last term, it appeared that the defendants were partners, as coach-masters; that the horses in question had been sold by the plaintiff to a person of the name of Gray, who had given his promissory notes for them, payable at one and two months; that the notes had been dishonoured when they became due, and that Gray had afterwards become insolvent, and inserted their amount in

his schedule; it appeared also, that Gray was a horse-dealer; and several witnesses were called to prove that he had been set up by the defendants, and was, in fact, in partnership with them, and that they had taken possession of his whole stock at the time of his becoming insolvent. It was proposed to call Gray, on the part of the plaintiff, for the purpose of showing that the defendants were to provide money to purchase the horses, and that he was to be allowed a weekly salary out of the profits; but it was objected on the part of the defendants, that his evidence was inadmissible, without a release from them.

His Lordship being of opinion that this objection was well founded, the plaintiff's counsel elected to be nonsuited. Leave, however, was granted to the plaintiff to apply to the Court for a rule to set aside the nonsuit, and that a new trial should be granted, in case they should be of opinion that Gray's testimony was improperly rejected.

Mr. Serjeant *Wilde* now moved accordingly. The evidence of Gray was improperly rejected at the trial. He was liable, in any event, for the debt to the plaintiff, upon his promissory notes; and his condition could not at all be altered by the verdict, whether the jury found for the plaintiff or the defendants. Although it might be said, that if the defendants paid the debt, it would relieve Gray; yet, if he was clearly liable to the plaintiff, the record in this suit could not avail him as a discharge. If the defendants intended to set up as a defence, that Gray was a partner with them, they should have pleaded in abatement. It was impossible to prove the nature of the contract between the plaintiff and the defendants, without the evidence of Gray. The plaintiff was, therefore, compelled to submit to a nonsuit. The evidence of Gray should have been admitted, as he was in fact called against his own interest. The only instance in which the record could be evidence for him, would be in case of an action against him by the defendants, for contribution. Although in *McBrain v. Fortune*, 3 Camp. 317, which was an action for goods sold, it was held, that a person who entered into a contract for the purchase of the goods in his own name, was not a competent witness to prove that he purchased them as the agent of the defendant; yet there is a manifest difference between that case and the present, as there the witness was called to prove an act to have been done by him in the capacity of agent; and, if it were established that he had been adopted by the plaintiff in that capacity, he could not afterwards be treated by him as a principal, and charged as such: therefore, he had a clear interest in the event of the suit; but here, Gray has not any such interest, for, being clearly liable for the whole debt to the plaintiff, the verdict in this case would not discharge him.

Lord Chief Justice BEST. I am still of opinion that the testimony of Gray was properly rejected, inasmuch as I consider him to have been interested in obtaining a verdict against the defendants. In *Ward v. Wilkinson*, 4 Barn. & Ald. 410, indeed, it was held, in an action of trover by A. against B., that C. was a competent witness to prove property in himself; but there is a wide distinction between that case, which was in tort, and the present, where the witness was called to prove that others were liable for a debt which he himself contracted, and for which he still remains liable to the plaintiff, and he would continue so if the plaintiff were defeated; and if he recovered, Gray would be liable to the defendants, in an action for contribution, as he was in partnership with them. The contract, then, by the plaintiff, was with Gray, but the action is brought against other persons; if, therefore, a verdict were established against them, Gray would thereby be liable for a certain proportion only, instead of the whole debt. *Prima facie*, Gray was the principal; the contract was with him, and if he were allowed to prove, that others were liable jointly with him, his evidence would tend to exonerate himself from paying three-fourths of the debt; and throw that burthen upon the defendants. I cannot distinguish this case from that of *McBrain v. Fortune*; and although I do not often rely much upon a decision at *Nisi Prius*, yet I think the principle upon which that case was determined was correct.

Mr. Justice PARK. In the case of *McBrain v. Fortune*, Lord Ellenborough

said—"If the witness was the agent of the defendants, there is no reason why this circumstance may not be proved by other evidence. Then he has a clear interest, without any counterbalance, in the event of this action. If it succeeds, the verdict would be evidence for him in an action against himself, to which he is *prima facie* liable. The remedy, which it is supposed he would have against the defendants, if he were sued upon this contract, cannot be thought to render it a matter of indifference to him, whether the plaintiff shall succeed in this action, or be driven to sue him as the real purchaser of the goods. He is not in the situation of a broker; for the broker buys and sells in the name of his principal, and has no personal liability to be discharged by the effect of his evidence." I think his Lordship's reasoning is strictly applicable to the present case, and that Gray's evidence was properly rejected, he having a direct interest, *pro tanto*, in procuring a verdict against the defendants.

Mr. Justice BURROUGH concurred.

Mr. Justice GASELEE. I am of the same opinion. In *Brown v. Brown*, 4 Taunt. 752, in an action against two, on a joint contract, it was held that one who had suffered judgment by default, was not admissible as a witness against the other, to prove that he joined in the contract; because, if the plaintiff succeeded in the action, the witness would obtain, by his own testimony, contribution against the other.

Rule refused.(a)

(a) See *Taylor v. Cohen*, 3 Bingh. 53, where certain creditors of a bankrupt agreed amongst themselves, at a private meeting, to appoint the plaintiff their attorney, to act for them in watching the proceedings under the commission, in order to prevent fraudulent proofs, and that the expenses should be borne in the usual way (that is, rateably, in proportion to the amount of the claim of each upon the estate)—it was held, that one of the creditors, who had paid his proportion of the plaintiff's bill, was a competent witness to prove that the defendant was a party to the agreement.

EDWARDS v. SMITH, Bart.—p. 59.

Where cattle had been sold by the plaintiff to A., and it appeared that at the time of sale A. managed the defendant's farm, that he had always his money in hand, and that he had then to the credit of his account more than the value of the cattle, that the defendant had never authorized him to buy on credit, that he had sometimes bought for the defendant and sometimes for himself, that the cattle had been paid for by bills drawn on A. which had been dishonoured when due, and afterwards renewed by the plaintiff:—Held, that it was sufficient to leave it to the jury to say whether the cattle had been sold on the credit of the defendant or of A., and it was not necessary that it should be left to them to say, whether the plaintiff, at the time of the sale, was aware that A. was acting as the agent of the defendant.

THIS was an action of assumpsit for goods sold and delivered, brought to recover the value of certain cattle alleged to have been sold by the plaintiff to the defendant.

At the trial, before Lord Chief Justice Best, at Westminster, at the Sittings after the last Term, it appeared that the plaintiff was a Welsh drover, and that the sale of the cattle was effected through the means of a person of the name of Mansfield: and the only question was, whether the cattle had been sold by the plaintiff to Mansfield on his own account, or on account of the defendant. Mansfield was called as a witness, and said, that he had managed the defendant's farm at the time of the sale; that he had always money of the defendant's in hand; and that he had then to the credit of his account more than the value of the cattle; that the defendant had never authorized him to buy upon credit; that he sometimes had bought for the defendant, and sometimes for himself; that the cattle in question had been paid for by bills drawn on him by the plaintiff, which had been dishonoured when due, and afterwards renewed by the plaintiff; and that he, the witness, had afterwards become insolvent.

His Lordship left it to the Jury to say, whether the cattle had been sold on

the credit of the defendant, or of Mansfield. They found that the credit had been given to the latter; and accordingly returned a verdict for the defendant.

Mr. Serjeant *Wilde* now applied for a rule nisi, that this verdict might be set aside, and a new trial granted. It was not sufficient to leave it to the Jury merely to say, whether the credit had been given to the defendant or to Mansfield; but it should also have been left to them to say whether, at the time of the sale in question, the plaintiff knew that Mansfield was acting as the agent of the defendant. If a party deal with another as a principal, although he may know that he is only acting as an agent, yet, if he gave credit to him in the former capacity, he is bound by the contract, and cannot afterwards revert to the real principal. This principle was established in the case of *Patterson v. Gandasequi*, 15 East, 62.

Lord Chief Justice BEST. I left it to the Jury to say whether the plaintiff sold the cattle upon the credit of Mansfield or of the defendant: the former having stated that he had always money of the defendant's in hand. The Jury found that the credit had been given to Mansfield, and therefore, that the defendant was not liable to the plaintiff in the present action. It is quite immaterial whether, at the time of the sale, the plaintiff knew that Mansfield was acting as an agent or not; the question left to the Jury was, whether the cattle were sold on his credit; and as it appears to me, from the facts of the case, it was properly found by them, that the cattle had been so sold; Mansfield indeed, said, that he had always money of the defendant's in hand, and had been bailiff to him, and bought cattle for him for several years: but he also said, that he had never been authorized to buy upon credit for the defendant, and that he had frequently made purchases upon his own account, as well as upon the account of his principal. Besides, the cattle in question were paid for by bills drawn by the plaintiff upon Mansfield, and accepted by him; they were not paid when due, and the plaintiff gave him further credit by suffering them to be renewed. There is, consequently, no reason to disturb the verdict, or say that the Jury have come to a wrong conclusion.

The rest of the Court concurring—

Rule refused.

WELD v. FOSTER.—p. 61.

To a declaration on a life policy, the Court would not allow the defendant to plead—first, the general issue; secondly, a fraudulent misrepresentation as to the state of health of the party whose life was insured; and lastly, that the policy was not under seal.

Mr. Serjeant *Onslow*, on a former day in this Term, obtained a rule nisi, for the defendant to plead several matters in this cause, which was founded on a policy of insurance for the life of the plaintiff, viz. first, the general issue; secondly, a fraudulent misrepresentation to the defendant, as to the plaintiff's state of health; and lastly, that the policy was not under seal.

Mr. Serjeant *Wilde* was now about to show cause, but—

Lord Chief Justice BEST. The defendant must admit the execution of the policy, and confine his pleas to the general issue and the fraudulent misrepresentation.

Mr. Justice GASELEE. It would be too much to put the plaintiff to strict proof of the policy, which the defendant, in fact, admits by the plea of fraudulent misrepresentation. Besides, it frequently happens that a policy is signed by several directors at different times, and the subscribing witnesses may not see the signature and execution of each.

The rest of the Court concurring—

Rule absolute

CARR and Another v. BROWNE.—p. 62.

A guarantee was given by the defendant, in consideration of the plaintiffs' giving A. a current credit, to make good, upon the event of his failure, any deficiency, not exceeding a certain sum. A short time after the guarantee was given, a bill, which had been previously given by A. to the plaintiffs, was dishonoured, and the plaintiffs permitted him to renew it without giving any notice of the transaction to the defendant:—Held, that this was not such a failure of the principal as to entitle the surety to a notice of the renewal of the bill.

THIS was an action of assumpsit, brought by the plaintiffs upon the following guarantee, which was signed by the defendant, and addressed to them.

“18th Feb. 1825.

“Gentlemen.—In consideration of your giving James Thompson Barber, of Reading, a current credit for silk, from the time of the date hereof, I hereby undertake, in consideration of such credit, upon the event of his failure, to make good any deficiency or loss you may sustain, not exceeding 400*l*.

(Signed)

“P. BROWNE.”

At the trial, before Lord Chief Justice Best, at Guildhall, at the first Sittings in this Term, it appeared, that, previously to the guarantee being given by the defendant to the plaintiffs, there had been dealings between the latter and Barber; and it was proved, that, a short time after the guarantee, a bill of exchange, which had been given by Barber to the plaintiffs, was dishonoured by him, but that the plaintiffs permitted him to renew it, without giving any notice of the transaction to the defendant; upon which, it was contended, that this operated as a discharge of the defendant as surety for Barber; but his Lordship being of a different opinion, the jury found a verdict for the plaintiffs, damages 400*l*.

Mr. Serjeant *Vaughan* now applied for a rule to show cause why this verdict should not be set aside, and a new trial granted. He referred to *Peel v. Tatlock*, 1 Bos. & Pul. 419.

Lord Chief Justice BEST. I still entertain the same opinion I formed at the trial, viz., that the defendant as surety was not discharged from his guarantee for Barber by the renewal of the bill by the plaintiff, and the want of notice thereof by him to the defendant. The question is, if a party take a guarantee for the solvency of another, and afterwards have reason to suspect that he is insolvent, and give no notice of his suspicion to the surety, the latter is thereby discharged? It has been said, that the renewal of the bill by the plaintiffs was evidence of the principal's failure; but I cannot accede to this proposition. There may be a renewal of a bill, without any failure in trade on the part of the person for whom the bill is renewed; it would be too much to say that a failure to perform a particular engagement is to be considered as a general failure.

Mr. Justice PARK. It cannot be contended, that a surety is to have notice from the party to whom he gives a guarantee of every transaction between him and the principal, or of every trifling failure on the part of the latter, of which the holder of the guarantee may happen to be aware. Here, the guarantee of the defendant was for the amount of 400*l*., and goods were furnished by the plaintiff, to Barber, on the faith of it. The renewal of the bill was certainly not such a failure as was contemplated by the terms of the guarantee, and therefore the defendant was not entitled to notice of such renewal.

The rest of the Court concurring—

Rule refused.

BLAND, Demandant; FAIRBANK, Tenant; TUCKER, Vouchee.—p. 65.

In a recovery, the words “Devon, (to wit)” were introduced in the margin of the warrant of attorney, and in the body the premises were described as situate in the county of the city of Exeter:—Held, immaterial, as the words in the margin would not appear in the exemplification, and might be rejected altogether.

HATCHARD and Another v. HAGUE.—p. 66.

Where the defendant had, before declaration delivered, tendered a sum of money in discharge of debt and costs, but the plaintiff declined to accept it, the Court refused to grant a rule, that, upon payment of such debt and costs by the defendant into Court, and upon the same being taken out by the plaintiffs, the subsequent costs should be paid by them; as their conduct did not appear vexatious or oppressive.

Mr. Serjeant *Wilde* applied for a rule calling on the plaintiffs to show cause why, on payment by the defendant into Court of the sum of 30*l.*, and the costs to the time of the declaration, and upon the same being taken out of Court by the plaintiffs, the subsequent costs should not be paid by them. The learned Serjeant founded his application on an affidavit, which stated, that the defendant had offered to pay the sum of 30*l.* (being, as the defendant alleged, the amount of the debt), and the costs, before the declaration was delivered; but that the plaintiffs had refused to accept them; that a summons was then taken out by the defendant, that, upon the payment of the above sum of 30*l.* and the costs then incurred, all further proceedings might be stayed; but that this also was objected to by the plaintiffs' attorney. The learned Serjeant, therefore, submitted, that, if the 30*l.*, together with the costs incurred up to the time of declaration, were paid into Court, and taken out by the plaintiffs, they would not be entitled to any subsequent costs. He referred to *Zeevin v. Cowell*, 2 Taunt. 203; *Roberts v. Lambert*, Ib. 283; *Burmester v. Hilch*, 13 East, 551; *Sawbridge v. Coxwell*, 4 Taunt. 255.

Mr. Justice PARK.^(a) The principle laid down by the Court of King's Bench in *Burmester v. Hilch*, was adopted by this Court in the late case of *Carr v. Smythies*, 6 B. Moore, 430, where the plaintiff, an attorney, claimed 20*l.* from the defendant, as his moiety of the expenses for preparing a lease; and, five years afterwards, sued him for the recovery of that sum; and the defendant, before the delivery of the declaration, took out a summons to stay proceedings on payment of 15*l.*, and the costs then incurred, which the plaintiff refused to accept, but proceeded in the action by delivering a declaration, and the defendant pleaded the general issue, and paid 15*l.* into Court, which the plaintiff afterwards took out in full satisfaction of his demand, the Court refused to deprive him of the costs incurred between the obtaining the rule, and the taking the money out of Court, there being nothing oppressive or vexatious in the plaintiff's conduct.

Mr. Justice BURROUGH concurred.

Mr. Justice GASELEE. In the case of *Sawbridge v. Coxwell*, the application was made *after* the plaintiff had taken the money out of Court. In *Burmester v. Hilch*, Mr. Justice Le Blanc said—"Without a strong case is made out to show an intentional vexation, and view to enhance expense on the part of the plaintiff, there seems to be no ground for the Court to interfere out of the ordinary course." And Mr. Justice Bayley said—"The only inconvenience that can ensue in such a case as this, is the additional costs of the declaration; but that would not necessarily overbalance the inconvenience of the new mode of proceeding now proposed." Here, there is no case made out of intentional vexation or oppression on the part of the plaintiffs, who only refused to accept the money at the time it was offered. Rule refused.

(a) Lord Chief Justice BEST was absent.

ROLT, Assignee of WELSFORD, a Bankrupt, v. WATSON.—p. 82.

The plaintiff declared in assumpsit as assignee of a bankrupt, for goods sold and delivered to the defendant by the bankrupt, before his bankruptcy:—Held, that a plea, alleging that on an account stated between the defendant and the bankrupt before his bankruptcy, the former gave his bill of exchange to the latter, and was still liable to him thereon, was bad upon general demurrer.

THIS was an action of assumpsit, brought by the plaintiff, as assignee of one Welsford, a bankrupt.

The first count of the declaration stated, that the defendant was indebted to the bankrupt before his bankruptcy, in the sum of 50*l.* for goods sold and delivered, and a promise to the bankrupt, before his bankruptcy, to pay him. There were five other counts, all of which stated the defendant to have been indebted to the bankrupt in the sum of 50*l.*; and the promises were laid to have been made by the defendant to the bankrupt, before his bankruptcy. There was a set of counts, in which the promises were alleged to have been made by the defendant to the plaintiff, as assignee of the bankrupt, after his bankruptcy.

The defendant pleaded—first, the general issue; and secondly, as to the first six counts, that after the making of the promises and undertakings in those counts contained, and before Welsford became a bankrupt, to wit, on, &c., at, &c., an account was had and stated by and between the bankrupt and the defendant, of and concerning the said several sums of money in the said six counts specified, and upon that occasion, he the defendant was found to be in arrear and indebted to the bankrupt in the sum of 14*l.* 10*s.* 2*d.*, for which said last-mentioned sum the bankrupt afterwards, to wit, on, &c., at, &c., made his bill of exchange in writing, and then and there directed it to the defendant, and thereby required him, three months after the date thereof, to pay to him or to his order, the said sum of 14*l.* 10*s.* 2*d.* for value received, which said bill of exchange the defendant, upon sight thereof, accepted, for and on account of the said several promises and undertakings in the said six counts contained; and by reason thereof, he, the defendant, then and there became, and was and still is liable to pay to the bankrupt or his order, the said sum of money in the said bill of exchange specified, according to the tenor and effect of the said bill of exchange, and of his, the said defendant's acceptance thereof.

The plaintiff added a *similiter* to the general issue, and demurred generally to the last plea.

The defendant joined in demurrer.

The cause now came on for argument, when—

Mr. Serjeant *Vaughan*, in support of the demurrer, having referred to the case of *Thomas v. Heathorn*, 2 Barn. & Cress. 477, S. C. 3 Dow. & Ry. 647, was stopped by the Court, who called on—

Mr. Serjeant *Wilde* to support the plea. The learned Serjeant admitted that *Thomas v. Heathorn* appeared to be in point. There, to a declaration in assumpsit by the assignees of a bankrupt, for 1000*l.* for goods sold, &c., the defendant pleaded, that on an account stated between him and the bankrupt, before the bankruptcy, he the defendant was found to be indebted to the bankrupt in the sum of 400*l.*; that the bankrupt drew a bill of exchange upon the defendant for the said sum of 400*l.* payable to him or his order, which the defendant accepted and returned to the bankrupt, whereby the defendant became, and was, and still is liable to pay the said sum of 400*l.* to the bankrupt or his order, or to the assignees or their order:—the plaintiff replied that, before the bankruptcy, the bill became due, and was presented to, and refused payment by the defendant, who still refuses to pay the same to the assignees; it was held, on general demurrer, that the defendant's plea was no answer to the action; inasmuch as it was pleaded to the whole of the demand; and the giving of a bill for 400*l.* was not in point of law a satisfaction of 1000*l.*, the amount of the debt claimed. But, in that case, the plaintiff took issue on the plea; whilst here he has demurred generally; and the plea is similar to that in *Kearlake v. Morgan*, 5 T

Rep. 513, where a plea in assumpsit, that the defendant, who was the payee of a promissory note, endorsed it to the plaintiff for and on account of the said debt, was held to be a good plea.

But the Court were of opinion, that this case fell clearly within the principle of *Thomas v. Heathorn*, which was precisely in point.

Judgment for the plaintiff.

HYDE v. WOMBWELL.—p. 85.

The defendant, a travelling showman, having been duly served with process, referred the plaintiff's attorney to a certain house in London, where he stated he should be on a given day; the notice of declaration was left there accordingly, but the person who left it was informed at the time, that the defendant did not reside, but occasionally called at the house, and that it was not known where he then was:—Held, not to be sufficient service of the notice.

MUNNINGS v. LENOX.—p. 133.

In an action of covenant on a charter-party, the defendant pleaded several special pleas, to some of which the plaintiff demurred, and, after argument, obtained judgment:—Held, that the defendant could not afterwards file additional pleas, although it was sworn that facts had come to his knowledge, material for defence, since the argument on demurrer, and with which facts he was then unacquainted.

THIS was an action of covenant, and brought by the plaintiff, a ship-owner, against the defendant, on a charter-party of affreightment, for not loading a full cargo of timber, according to the terms of the charter-party. The declaration alleged several breaches of covenant by the defendant, to which he pleaded eighteen special pleas.

To two of these the plaintiff demurred, and, after argument, the Court held them to be bad, and the plaintiff obtained judgment on the demurrer.

Mr. Serjeant *Vaughan*, on a former day in this term, obtained a rule nisi, to file two additional pleas. He founded his motion on an affidavit of the defendant's attorney, who stated, that, since the argument on the demurrer, some circumstances had come to the defendant's knowledge, with which he was before wholly unacquainted, and which the deponent believed would be a good defence, and furnish an answer to several of the breaches alleged in the declaration.

Mr. Serjeant *Taddy* now showed cause, and contended, that it was too late for the defendant to put additional pleas on the record, after the plaintiff had obtained judgment on two which he had demurred to. The defendant must be confined to the pleas as originally put in; and the Court will not allow the plaintiff to be harassed or put to further expense by the introduction of new pleas, which may completely alter the nature of the defence.

Lord Chief Justice BEST. This is certainly an application of the first impression. The defendant's attorney might or ought to have known the grounds on which the defendant rested his defence, before he filed the pleas. It would be contrary to justice and good faith if we were now to allow the defendant to put new pleas on the record, particularly, when the plaintiff has obtained judgment on those which were bad. Besides, the defendant pleaded no less than eighteen special pleas, when one fourth part of the number would have been sufficient. I very much doubt the policy of allowing a defendant to plead several pleas:—it tends to put the parties to an enormous expense, and frequently not only to defeat justice, but to perplex the Judge and jury at the trial.

The rest of the Court concurring—

Rule discharged.

JAMESON and Others v. DRINKALD and Others.—p. 148.

It is the rule of the sea, that a vessel sailing before or with the wind, should make way for one that is sailing by or against it : therefore, where, in an action on the case for running down the plaintiffs' brig, it was proved that the defendants' vessel was sailing in the Channel before the wind, having her studding sails set, at night, and that the plaintiffs' brig was sailing by the wind ; and the jury found a verdict for the defendants ; the Court granted a new trial on payment of costs, for the purpose of further investigating the facts, as there was some doubt as to the propriety of carrying studding sails at such a time and in such a place ; and also, as to whether the defendants' captain had kept a proper look out.

Where scientific men are called as witnesses, they are not entitled to give their opinions as to the merits of the case, but only as to the facts proved at the trial.

THIS was an action on the case, and brought against the defendants for running down the plaintiffs' brig. The declaration stated, that the plaintiffs were possessed of a certain brig or vessel called the Lively, which said brig or vessel, at the time of committing the grievance, &c., was navigating and sailing on the high seas, near the Scilly Isles, in the county of Cornwall ;—that the defendants were the owners of a certain other brig or vessel, called the Miranda, which said last-mentioned brig or vessel, a little before and at the time when, &c., was also navigating and sailing on the high seas aforesaid, near to the said brig or vessel of the plaintiffs, and was then and there under the care, direction, and management of the defendants and certain servants of theirs ;—yet that the defendants, not regarding, &c., then and there, by themselves and their said servants, so incautiously, negligently, unskilfully, and improperly managed, conducted, navigated, steered, and directed their said brig or vessel, that the same through the mere default, negligence, &c., of the defendants, and their said servants, did then and there, with great force and violence, run foul of, and strike upon and against the said brig or vessel of and belonging to the plaintiffs, and then and there broke, strained, and damaged the same ; by means whereof, the said last-mentioned brig or vessel then and there sank in deep water, and was thereby destroyed, and wholly lost, &c.

The defendants pleaded—Not guilty.

At the trial before Lord Chief Justice Best, at Guildhall, at the sittings after the last Easter term, the ownership of both the vessels was admitted ; and the captain of the plaintiffs' vessel was called, who stated, that, on the 14th December, 1825, at about ten at night, he was sailing about thirty or forty miles southwest of the Scilly Isles ; that there was no moon, but that he saw the defendants' vessel a considerable time before the accident happened ; that the wind was due east at the time ; that the Miranda was running before the wind, and sailing down Channel, while the Lively was coming up ; that the defendants' vessel did nothing to avoid the Lively ; but that the witness caused a light to be put up in her rigging, five minutes before the vessels struck ; that it was not his, the captain's, duty to alter his course, as the Lively was going by the wind, and that if a vessel under such circumstances meet one going before the wind, the rule is that the latter should alter her course. That the Miranda was a vessel of three hundred tons, and the Lively of one hundred and twenty-eight only : that the Miranda struck the Lively so forcibly, that one of her sides was driven in ; that the Miranda, at that time, was running at the rate of eight or nine knots an hour, and had all her foresails, topsails, and studding sails set ; and that there was no person on her bows. That the Lively went down ; and that the defendants' captain afterwards observed—"He had only just gone below, and if he had been on deck the accident should not have happened." That the collision might have been avoided, if the Miranda had kept to the leeward, which might have been done if her master had kept her helm a-starboard ; but that she did not alter her course at all. That the rule at sea is, if two ships meet, and one has the wind, and the other is sailing against it, that the former bears away, and the latter keeps her course. That the effect of a ship's carrying her studding sails was, that she could not throw herself back, so as to avoid an accident of this nature, without a probability of losing her masts.

The captain of the defendants' vessel stated, that it was his duty to be on the starboard watch; that he went below to enter a minute on the logbook; but that there were men above to keep a look out; that he was desirous of getting out of the Channel; that he heard the second mate, who was on deck, call out, "helm a-port," that this might have been done, if they had not had up the studding sails; but, as they were up, she would have lost her position, or been rendered motionless. That he saw no light from the plaintiffs' vessel, and that there were men upon the Miranda's bows, at the time she struck the Lively; that the shrouds of the two vessels were entangled for half an hour; and that the Lively lay across the Miranda's larboard bow; that the former vessel might have got out of the way: that it was not usual for a vessel going before the wind to carry a light; and that if one had been shown in proper time from the Lively, the witness must have seen it half a mile distant. That the Miranda was going at the rate of eight knots an hour; that it was customary to carry studding sails in the Channel during the night. That, towards the east, it was clear, but thick and foggy to the west. That the mate of the Miranda put the helm a-port; but that if it had been kept so, she would, most probably, have lost her mast; that the witness should have ordered his vessel to starboard, if he had known of the Lively's course before the Miranda struck her.

Several nautical men were called, who were not on board either of the vessels, but who gave their opinions from the statements made by the witnesses. Their evidence was contradictory, some being of opinion that the defendants' vessel, under the circumstances, did not carry an excessive press of sail, and that even on a dark night it was not dangerous to carry studding sails; that if the defendants' captain had kept the Miranda's helm a-port, the two vessels would have got alongside, and both might have been lost; that it was the duty of the plaintiffs' captain to have kept the Lively out of the way; and that the collision was to be imputed entirely to his want of skill. On the other hand, some were of opinion that the accident was owing to an error of judgment on the part of the defendants' mate, and that no fault was to be imputed to the plaintiffs' captain; and that the defendants' captain might have avoided the difficulty in two minutes: others said, that as the defendants' ship was going before the wind, the captain ought to have borne away: and one witness said, that no fault was imputable to either party.

The Lord Chief Justice, in summing up the evidence, told the jury, that, as the plaintiffs complained of the negligence of the defendants, if they were of opinion that there had been a negligence on the part of the latter, they would return a verdict for the former; but, if they thought the negligence lay with the plaintiffs, or that there had been no negligence on either side, but that the disaster arose purely from accident, then they would find for the defendants. His Lordship added, that, if he had to exercise his own judgment upon the facts, he should say, that there had been some negligence on the part of the defendants, inasmuch as their captain had carried studding sails, which prevented him from keeping his vessel's helm a-port, as, in such case, her masts might have gone overboard.

The jury, however, found a verdict for the defendants; and said, that they thought that no blame could be attached to either party.

Mr. Serjeant *Vaughan*, in the last Term, obtained a rule *nisi*, that this verdict might be set aside, and a new trial granted, on the grounds that the defendants' captain had either been guilty of negligence, or that their vessel, having the wind, should have made way for the plaintiffs' brig, which was sailing by the wind; that the Miranda, at any rate, should not have had her studding sails set on a dark night; and that, as the plaintiffs' captain had caused a light to be hoisted in the rigging before the accident took place, it was the duty of the defendants' captain to have kept a better look out. That the verdict could only be justified, if the accident could be considered as inevitable, or if it appeared that the defendants had been guilty of no negligence whatever: that it was the duty of their captain to have been on deck, at the time the collision took place.

and indeed, from his own admission, it appeared that if he had been there, the accident would not have happened. The balance of testimony of the nautical men who were called, was, though contradictory, in favour of the plaintiffs, rather than of the defendants.

Mr. Serjeant *Boanquet*, and Mr. Serjeant *Spankie*, now showed cause; and submitted, that the facts had been most properly left to the jury; and that, as the evidence on both sides was fully before them, they had come to a right conclusion, and therefore that their verdict could not be disturbed.

Mr. Serjeant *Vaughan*, and Mr. Serjeant *Wilde*, in support of the rule.

Lord Chief Justice BEST. I think the application for a new trial ought to be granted upon payment of costs; as it appears to me, on the objections which have been raised to the verdict, that there are facts which should be further inquired into. I confess, that, looking at all the circumstances of the case, I am still of opinion that the collision of the two vessels is wholly to be attributed to accident; and that some misconduct is imputable to the defendants' captain in carrying so large a press of sail, and in not keeping his vessel to leeward. No objection was raised, on either side, as to the examination of nautical men; and, it is true, that some of them were of opinion that there had been no misconduct or neglect on the part of the defendants; but, that, if there were any, it lay with the plaintiffs, who might have got out of the way of the *Miranda*, if they had taken proper precaution. I must confess that I do not think so, but I do not venture to set up my own opinion against those of nautical men, on such a subject; but their evidence was in some points contradictory, and I thought that on the whole, the balance of testimony was in favour of the plaintiffs: the jury, however, thought otherwise; but, under all the circumstances, I think it better that the cause should go down to be re-tried, when many important facts may be more fully investigated; and I am particularly anxious that justice should be done between the parties.

Mr. Justice PARK. I have not formed any opinion in this case; for, after the motion for a new trial, and the report of my Lord Chief Justice, I certainly was not satisfied with the verdict of the jury: and, although I have been a good deal staggered at some observations made by the defendants' counsel, yet I think it would be far more satisfactory that this case should be reconsidered by another jury. With regard to the opinions of the nautical men who were called at the trial, I think, that the evidence adduced was not sufficient to call for such opinions: witnesses so called may state upon oath, to what they think the cause of the accident might be attributable; but they ought not to say that they consider the fault to have been either on the one side or the other. I remember, in an indictment for murder, tried before Mr. Baron Garrow, at Stafford, questions were put to a surgeon, who was called as a witness, as to the cause of the death of the deceased; and the witness went further than he was authorized by one of such questions, and stated it as his opinion that the prisoner had not been guilty of murder, and he was acquitted.

Mr. Justice BURROUGH. I unwillingly yield to the rule being made absolute. As the evidence was thoroughly investigated on both sides, I should be inclined to adhere to the decision of the jury: but, as my Lord Chief Justice, before whom the cause was tried, is dissatisfied, there must be a new trial, on payment of costs.

Mr. Justice GASELER. I shall give no opinion either as to the propriety or impropriety of the verdict; but I agree with my Lord Chief Justice, that it is better this case should undergo a further investigation. As to the testimony of the nautical men, I am clearly of opinion, that a scientific person, called as a witness, is not entitled to give his opinion as to the merits of a case, but only as to the facts, as proved by other witnesses.

Rule absolute on payment of costs.

ROWE and Another v. HARVEY.—p. 158.

Where, by a Judge's order, the defendant had a week's time to put in bail:—Held, that an attachment could not be moved against the Sheriff, for not bringing in the body, until such order was discharged.

MR. Serjeant *Vaughan*, on a former day in this Term, obtained a rule *nisi*, for an attachment against the Sheriff of Middlesex, for contempt, not bringing in the body of the defendant.

MR. Serjeant *Wilde* now showed cause upon an affidavit, which stated, that, by an order of Mr. Justice Burrough, the defendant had a week's time to put in bail; which time had not expired when the attachment was moved for; that bail has since been put in, and that the defendant had rendered in their discharge. The learned Serjeant submitted, that a motion should have been made to have discharged the Judge's order, before the rule for the attachment was moved.

LORD Chief Justice BEST. We cannot get over the difficulty as to the form of the motion: the plaintiffs should certainly have applied for a rule to set aside the Judge's order, instead of moving for an attachment in the first instance. We cannot say that the Sheriff has been guilty of a contempt in not doing what the Judge's order has excused him from doing.

MR. Justice PARK. It is quite clear that a motion should have been made to discharge my brother Burrough's order, *quia improvide emanavit*, before the Sheriff could be fixed for a contempt. The order was in fact a stay of proceedings; and the Sheriff was not bound to bring in the body until the time for putting in bail had expired.

MR. Justice BURROUGH. The rule for the attachment against the Sheriff was certainly premature, there should have been a rule to discharge my order in the first instance.—Besides, the defendant has now rendered, there can, consequently, be no ground for an attachment against the Sheriff for not bringing in the body.

MR. Justice GASELEE concurring—

Rule discharged.

BANAZELETTI, Demandant; DAWSON, Tenant; KINGMORE, Vouchee.—
p. 159.

A recovery may be amended by altering the name of a parish, in which the premises intended to pass are situate, although such parish is erroneously described in the deed to lead the uses.

EAGLE v. BROWN, a Prisoner.—p. 161.

A note for the payment of the weekly sixpences under the Lords' act, signed by the plaintiff's attorney only, is insufficient.

BERNEY v. GREEN.—p. 174.

Where, in an action of assumpsit upon a special agreement, the declaration and the issue varied from the record, (which corresponded with the agreement,) as to the description and price of certain goods mentioned in the agreement:—The Court refused to set aside the verdict, which had been found for the plaintiff, on the ground of their variance, as it might have been amended at the trial.

Mr. Serjeant *Wilde*, on a former day in this Term, obtained a rule nisi, that the verdict, which had been found for the plaintiff in this cause and all the proceedings subsequent to the issue, might be set aside for irregularity; on the ground of a variance between the record and the issue.

The learned Serjeant founded his motion on an affidavit, which stated, that the action was brought for business done for the defendant, under a written agreement; that the cause was tried before Lord Chief Justice Best, at the last Summer Assizes at Norwich; that the declaration was filed upon the 8th of June, and that the issue and notice of trial were delivered on the 24th; that upon examining the issue with the declaration, it appeared there was a variance between them in the first and second counts, which were specially framed upon the agreement, in the description of certain goods, which were furnished by the plaintiff to the defendant, and also in the prices charged for them; that the plaintiff's agent was informed of the variance, and desired to make the issue to correspond with the declaration; that the record differed both from the issue and the declaration; that, on the 12th of July, a summons was taken out to amend the declaration; that the plaintiff's attorney said he wished to examine the issue with the record, but that the alteration was not then pointed out; that the summons was discharged; and that the record now differs from the declaration and issue as to the price to be paid for the goods in question; but that the record corresponds with the original agreement, which the declaration and issue do not.

Mr. Serjeant *Vaughan* was now about to show cause, when the Court called on—

Mr. Serjeant *Wilde* to support his rule, cited *Doe d. Cotterill v. Wylde*, 2 Barn. & Ald. 472; *Jones v. Tatham*, 8 Taunt. 634.

Lord Chief Justice BEST. Although this case is distinguishable in circumstances from those which have been cited, yet the principle established by them applies. A record at *Nisi Prius* ought not to differ from the declaration or issue delivered; and if it does, the Court, upon application, will set it right; and amendments are made on payment of costs by the party applying to amend; this is the constant practice. The plaintiff's attorney was induced to believe that the error might be amended; and if I had been aware of the mistake at the trial, I would have ordered it to be set right; but the agents in town did not sufficiently instruct the attorney in the country; if they had been at the trial they might have pointed out what the error was; and therefore I discharged the summons. The defendant did not then take the objection; but in fact it is immaterial: the variance should have been pointed out by him at the trial; but it would not have been a ground for a nonsuit. We ought not to permit attorneys to take objections of this nature. I think, therefore, that the rule for setting aside the verdict must be discharged, and with costs.

Mr. Justice BURROUGH. I am of the same opinion. The cause has been tried upon its merits, and we ought not to set aside the verdict upon a mere technical objection.

Mr. Justice PARK concurred.

Mr. Justice GASELEE. The objection as to the variance ought to have been made before my Lord Chief Justice at the trial, when the plaintiff would have been allowed to make the necessary amendment, upon payment of costs; but as the error was not then pointed out, the defendant now comes too late to seek to set aside the verdict.

Rule discharged, with costs.

CASES IN HILARY TERM,

7 & 8 GEO. IV.—1827.

LINDSAY v. LAMBERT.—p. 209.

The general assignment of the personal estate of an insolvent by the provisional assignee of the Insolvent Debtors' Court to the after appointed assignees, does not vest in the latter a term of years, unless they do some unequivocal act to manifest their acceptance; a mere attempt to make it available to the estate is not such an exercise of ownership as to create an implication of assent.

THIS was an action of covenant brought to recover the value of a quarter's rent of premises at Paddington, let on lease to one Biddell. The defendant pleaded, that the estate, right, title, and interest of Biddell did not come to, or vest in him, *modo et forma*: whereupon issue was joined.

Upon the evidence given at the trial, which took place before the Lord Chief Justice, at the sittings at Westminster, after the last term, (a) the facts were as follows:—

A lease of the premises in question had, in the year 1823, been granted by the plaintiff to Biddell, at the yearly rent of 90*l.* payable quarterly. In 1825, Biddell became insolvent, and obtained his discharge under the act then in force for the relief of insolvent debtors; and, in December of that year, the defendant, who had been appointed his assignee, obtained the lease by virtue of the assignment from the provisional assignee of the Insolvent Debtors' Court, and retained it in his hands until May 1826, having in the interim put a person in possession, with instructions to let the premises; but, though several applications have been made by parties desirous of taking them, they remained unlet. On the plaintiff's agent afterwards calling upon the defendant for payment of rent, he said he would pay it, if he could make anything by the house; but subsequently abandoned the lease.

His Lordship left it to the jury to say, whether the defendant had accepted the lease absolutely or conditionally, or had retained it an unreasonable time. The jury found that he had only taken it conditionally, and that he had not retained it an unreasonable time.

A verdict was thereupon entered for the defendant, and leave reserved to the plaintiff to move that it might be set aside and a verdict entered for 22*l.* 10*s.*, the amount of rent due, if the Court should think him entitled to recover.

Mr. Serjeant Taddy now moved for a rule nisi to that effect—citing *Crofts v. Pick*, 8 B. Moore, 384; S. C. 1 Bing. 354; *Turner v. Richardson*, 7 East, 335; S. C. 3 Smith, 330; *Copeland v. Stephens*, 1 Barn. & Ald. 593.

Lord Chief Justice BEST. I am of opinion that there is no ground for disturbing this verdict. The assignees of an insolvent debtor certainly stand in precisely the same situation, with respect to their acceptance or rejection of demised premises, as the assignees of a bankrupt. In *Crofts v. Pick*, the property of the insolvent vested by the assignment in the provisional assignee of the Insolvent Debtors' Court, as the officer of that Court; here, the lease has been assigned by him to the defendant. *Turner v. Richardson* has established that the mere assignment will not vest the term in the assignees. Indeed, if a contrary doctrine were to prevail, the assignment would often prove rather a *damnosa hæreditas*, than a means of liquidating the debts of the bankrupt or insolvent. The interest in the term is not absolutely conveyed to the assignee, until he has done some unequivocal act to signify his assent. Was any such act done here? It was left to the jury to say, whether or not the defendant had

(a) See 2 Car. & Payne, 526

accepted the lease absolutely, and whether or not he had retained it an unreasonable time. The jury found that he neither had accepted the term, nor had retained the lease for an unreasonably long period. He did, in fact, no more to make the property in the term vest in him, than did the defendant in the case of *Turner v. Richardson*. He took the lease in order to ascertain whether or not it would prove beneficial to the creditors to accept it as part of the insolvent's estate; and, not being able to let the premises to advantage, he abandoned the term.

Mr. Justice PARK. I am of the same opinion. The case of *Crofts v. Pick* does not seem to me to have any bearing upon this. *Turner v. Richardson* must guide our decision.

Mr. Justice BURROUGH. *Turner v. Richardson* is expressly in point. We cannot turn a conditional into an absolute acceptance.

Mr. Justice GASELEE. The case of *Turner v. Richardson* is decisive of the question, although the issue is, whether or not the estate came to the defendant by the assignment. In *Williams v. Bosanquet*, 3 B. Moore, 500, S. C. 1 Brod. & Bingh. 238, covenant for non-payment of rent was held to lie against an assignee of a lease, to whom an assignment had been made by way of mortgage security, though he had never entered or taken actual possession. But then the assignment must be absolutely accepted. Rule refused.

WICK v. HODGSON.—p. 213.

On a sale of fixtures by an outgoing to an incoming tenant, the following memorandum was given by the broker employed by the former:—"Received of Mr. H. 3*l*. for letting a house to him for a term of seven years; Mr. H. to take the fixtures at a valuation, if he be accepted as tenant; and, in the event of his not being accepted as tenant, then the 3*l*. to be returned." In an action for the price of the fixtures:—Held, that fixtures are not "goods, wares, or merchandise" within the exception of the Stamp Act, 55 Geo. 3, c. 184; and, therefore, that the above memorandum, being part of the contract between the parties, could not be received in evidence without a stamp.

HUBERT v. MOREAU.—p. 216.

The 6 Geo. 4, c. 16, s. 131, provides that no bankrupt, after the allowance of his certificate, shall be liable to pay any debt barred by such certificate, upon any promise made after the suing out of such commission, unless such promise be in writing, signed by the bankrupt, or by some person authorized in writing by him:—Held, that a promise in the handwriting of the bankrupt, but bearing no signature, was not sufficient to take a case out of the statute

JENKINS v. LAWRENCE, Esq., Sheriff of Gloucestershire.—p. 230.

In an action against a sheriff for an escape, the Court refused to allow the venue to be changed to the county in which the escape took place, although it was sworn that all the witnesses resided there.

ADAMS, Gent., One, &c., v. BUGBY, Gent., One, &c.—p. 255.

An attorney of the King's Bench, arrested at the suit of an attorney of this Court on process out of this court, will not be discharged on motion, but must plead his privilege.

LEYKARIFF v. ASHFORD.—p. 281.

An alteration in the date of a bill of exchange, with the assent of the acceptor, before its negotiation by the drawer, is not such a re-issuing of the bill as to render a new stamp necessary.

HICKS, Demandant; DEAN, Tenant; CRUMP and Others, Vouchees.—p. 295.

The Court permitted a recovery to pass, notwithstanding the warrants of attorney of the several vouches were on separate pieces of parchment.

CASES IN EASTER TERM,

8 GEO. IV.—1827.

BRACKENBURGH, Demandant; ———, Tenant; TATTON, Vouchee.—p. 303.

The Court allowed a recovery suffered sixty-four years since to be amended by the insertion of "woodlands," in accordance with the deed to lead the uses.

UPTON v. ELSE.—p. 303.

On a plea of the statute of limitations—Held, that a new promise *infra sex annos* need not be declared on specially, although made thirteen years after the accrual of the original cause of action.

THIS was an action of assumpsit tried before Lord Chief Justice Best, at the last Assizes at Nottingham.

The declaration consisted of the common money counts. The defendant pleaded *actio non accrevit infra sex annos*. The plaintiff replied, that the cause of action accrued within six years: whereupon issue was joined.

At the trial, the plaintiff gave evidence of a conversation he had with the defendant, within six years of the commencement of the action, but about thirteen years after the accrual of the original cause of action, wherein he admitted the debt, and promised to pay it.

His Lordship being of opinion that this was a sufficient acknowledgment to take the case out of the statute, directed the Jury to find for the plaintiff.

Mr. Serjeant *Spankie* now moved for a rule nisi, that this verdict might be set aside, and a nonsuit entered, or a new trial had. He submitted, that the plaintiff could not recover for so stale a demand under the common counts, but

should have declared specially on the new promise; for that the issue taken on the replication had reference to the original cause of action on which the plaintiff's demand arose, and not to any subsequent promise.

Lord Chief Justice BEST. We have every wish to give full effect to the statute. Probably the new promise ought in strictness to be declared on specially; but the practice is inveterate the other way, and we cannot get over it.^(a)

Mr. Justice PARK concurred.

Mr. Justice BURBROUGH. Notwithstanding the statute, the original debt remains; the remedy only is gone.

Mr. Justice GASELEE. The only case in which it has been held necessary to declare specially on a promise of this kind, is that of an executor or an administrator. Rule refused.

(a) See the statute 9 Geo. 4, c. 14.

CASES IN TRINITY TERM,

8 GEO. IV.—1827.

REX v. JEWSON, in a cause of WARDER v. CALVERT and Another.—p. 488.

A rule for an attachment against the chief bailiff of a liberty, for not bringing in the body, was obtained on the 12th February, and the attachment not sued out until the 19th May following, and in the interim one of the defendants in the original action obtained his discharge under the Insolvent Debtors' Act:—The Court set aside the attachment.

PIERCE, surviving Executor of ROBERT PIERCE, deceased, v. BREWSTER and WILLIAMS, surviving Partners of WYATT and POOLE, deceased.—p. 515.

To take a case out of the statute of limitations, evidence of conversations, in which one of the defendants had admitted the debt, and said—"that it was hard that he should be called upon individually to pay the debts of the firm, when so many outstanding debts due to them were uncollected; that he had put the debts into the hands of an accountant, who would settle the business; and that he might refuse to pay altogether, but would not act in that way"—was held sufficient to constitute an absolute promise to pay.

THIS was an action of assumpsit, brought by the plaintiff, as surviving executor of Robert Pierce, deceased, to recover from the defendants, as surviving partners of Benjamin Wyatt and Anthony Poole, deceased, the sum of 986l. 7s., for goods sold and delivered (stamps and paper) by the testator in his lifetime, to the defendants and their late partners, who were proprietors of a newspaper called "The North Wales Gazette."

The declaration contained counts for goods sold and delivered, and the common counts, alleging promises to the testator in his lifetime, and to the plaintiff, as executor, since the testator's death.

The defendants pleaded—first, the general issue—secondly, *actio non accrevit infra sex annos*; whereupon issue was joined.

The cause was tried before Mr. Baron Vaughan, at the last assizes at Shrewsbury. It appeared that the paper in question was published by the defendants; that the publication commenced in 1803; and that an account was delivered to

the defendants, for stamps and paper furnished by the testator, commencing in December 1807, and ending in April 1816, on which the balance claimed to be due to the testator was 986*l.* 7*s.* To take the case out of the statute of limitations, the plaintiff gave the following evidence:—

In the year 1815, the defendant Brewster was applied to for payment of the account, when he said—"that the debts due to the partnership concern must be collected and Mr. Pierce's (the testator's) account settled." In 1817, Brewster paid 200*l.* on account, and promised to pay the balance, with interest. In 1820, the plaintiff's solicitor called on Brewster to demand a settlement of the balance, when Brewster said—"that it was very hard for him to pay individually, when there were so many outstanding debts due to the concern uncollected; and that he thought the account ought to be paid out of those debts." In 1823, the solicitor made another application to Brewster for payment, and handed him the account, which Brewster refused to look at, desiring that it might be sent to Mr Whittle (an accountant) who would settle the business. On this occasion also Brewster talked of the hardship of being obliged to pay individually, and said that he had put the debts of the estate into the hands of an accountant, and they had not been collected. He also spoke of certain over-charges in the account, and said—"that he might refuse paying the account altogether, but that he would not act in that way."

The following letter, dated the 30th August, 1825, and written by the defendant Williams to the plaintiff, on being applied to for the settlement of the account, was also given in evidence:—

"Glyn Conway, 30th August, 1825.

"Sir—Your letter of the 19th instant was sent to me at this place. As I have no knowledge of the account you mention, I beg leave to refer you to Mr. John Brewster, of Chester, who is the person bound to settle it, and I suppose will do it."

No evidence was offered on the part of the defendants: but it was submitted that the plaintiff ought to be nonsuited, on the ground that he had produced no sufficient evidence of a promise by the defendants to pay the plaintiff's demand, within six years, so as to take the case out of the statute—the promise, if any, being conditional, to pay out of the debts outstanding, when collected; and the case of *A'Court v. Cross*, 11 J. B. Moore, 198, S. C. 3 Bing. 329, was referred to.

The learned Baron, however, declined to nonsuit; but left it to the Jury to say, whether, from the parol testimony adduced for the plaintiff, and the letter written by the defendant Williams, there was not sufficient evidence of a promise to pay the debt, within six years.

The jury found in the affirmative, and a verdict was accordingly entered for the plaintiff—damages, 627*l.* 12*s.*, being the amount of the debt exclusive of interest: leave being reserved to the defendants to move that this verdict might be set aside, and a nonsuit entered; if the Court should consider the objection to be well founded.

Mr. Serjeant *Peake* accordingly, in the course of the last term, obtained a rule nisi.

Mr. Serjeant *Bosanquet* was now about to show cause, but the Court called upon—

Mr. Serjeant *Peake* to support his rule. The case of *A'Court v. Cross* has decided that a mere acknowledgment of a debt barred by the statute of limitations, will not revive it; there must also be an unconditional promise to pay, or, if conditional, the contingency must be shown to have happened. The evidence given in this case clearly amounted to no more than a conditional promise to pay the plaintiff's demand when the outstanding debts due to the firm were collected. In every conversation proved, these debts were alluded to. In *Swan v. Sowell*, 2 Barn. & Ald. 759, the defendant did not deny the debt, but said that the plaintiff owed him a great deal more money, and that he had a set-off against the

note; and Mr. Justice Bayley and Mr. Justice Holroyd were of opinion that that was not sufficient to take the case out of the statute.

[Lord Chief Justice BEST. The line adopted by the Court of King's Bench in that case was giving effect to the defendant's set-off, though not pleaded.]

In *Besford v. Saunders*, 2 H. Blac. 116, it was held, that a bankrupt who has obtained his certificate is not liable in assumpsit upon a promise to pay when he is able a debt due before his bankruptcy, unless such ability be shown. Here, upon the fair construction of all the several conversations proved to have been had with the defendant Brewster touching this debt, nothing like an unconditional promise to pay appears. Where the expressions used are equivocal, the onus of proof as to their tendency rests upon the plaintiff.

Lord Chief Justice BEST. The conclusion to which we have arrived in this case will not in any degree militate against our decision in *A'Court v. Cross*. It is perfectly clear, that, where a man simply admits that he owes a debt, and at the same time affirms that he will not pay it, such an acknowledgment does not amount to a promise to pay, so as to take the case out of the statute; for, to entitle the plaintiff to recover, there must be a cause of action accruing within six years, and, unless there is a promise, or that which amounts to a promise to pay within the six years, there can be no cause of action. I am clearly of opinion that this case was properly left to the jury. They were directed to find whether or not there was a promise to pay. They have found that there was. I therefore see no reason for disturbing the verdict. It has been contended that the promise, at most, was conditional, to pay when the outstanding debts due to the firm were collected. But I do not think the promise proved was a conditional one. The defendant Brewster merely observed that it was hard upon him to be called upon to pay, when there were so many outstanding debts due to the concern uncollected; and, when applied to again in 1828, he desired that the account might be handed to Whittle, who was to settle the business. That, of course, meant by paying it. That this was his meaning is clear from the context; for, he further says, that he had put the debts into the hands of an accountant: and, although he afterwards said that he might refuse to pay altogether, but that he would not act in that way, that was a mere commentary upon the former part of the conversation, it superadded no condition.

Mr. Justice PARK. The latter part of the evidence, of the defendant's having said that he had put the matter into the hands of an accountant to settle, is very strong when coupled with his remark as to the over-charges. In *A'Court v. Cross*, this Court brought back the previous authorities to a certain point; and our decision has since been confirmed by the Court of King's Bench in *Tanner v. Smart*, 6 Barn. & Cress. 603. There can be no doubt in this case that the defendant Brewster himself contemplated his liability from the year 1815, up to the date of the last conversation, in 1823. The case was properly left to the jury, and the learned Baron who presided at the trial is not dissatisfied with their verdict.

Mr. Justice GASELEE.(a) The case of *A'Court v. Cross* is not the last upon this subject that has come before this Court. The same principle was involved in *Scales v. Jacob*, 11 J. B. Moore, 553; S. C. 3 Bing. 638. Whether the admission of the debt amounts to a promise to pay, is a question proper to be left to the jury. In the present case, I am clearly of opinion that there was that which amounted to an absolute and unconditional promise to pay. In a variety of conversations had with the defendant Brewster, in the years 1820 and 1823, he is represented to have said, that although he might refuse to pay, yet he would not act in that way; he was also proved to have referred to an accountant, who he said was to settle the business, and to have objected to certain charges in the account. Upon the whole, I think the jury were well warranted in coming to the conclusion they did.

Rule discharged.

(a) Mr. Justice BURROUGH was at Chambers.

PARKER v. YATES.—p. 520.

An attorney, who has in that character received papers from a client, cannot be called to produce them in a cause, although he does not act therein as the attorney of the party.

THIS was an action of replevin for taking the plaintiff's goods. The defendant avowed for five years' rent due to him from the plaintiff, at 20% a year, payable quarterly. Plea—non tenuit.

The cause was tried before Mr. Baron Vaughan, at the last assizes at Worcester. To prove the tenancy, the defendant called one Wilson, an attorney, who had formerly been employed professionally by the plaintiff, in obtaining his discharge under the Insolvent Debtors' Act. He was called upon to produce a receipt given by the defendant to the plaintiff for rent due in respect of the premises, which receipt he admitted to be in his possession; but stated that it had come into his hands in his character of attorney to the plaintiff. On the part of the plaintiff, it was contended that the witness could not be called upon to produce anything that had come to his hands confidentially, whilst acting as the professional adviser of the party.

The learned Baron thought, that, under the circumstances, the witness could not be compelled to produce the receipt; and that the plaintiff ought not to be placed in a more unfavourable situation in consequence of having placed the document in the hands of his attorney, than he would have been in had it remained in his own possession. A verdict was thereupon taken for the plaintiff, leave being reserved to the defendant to take the opinion of the Court upon the above objection.

Mr. Serjeant *Peake* accordingly, in the last term, obtained a rule nisi that this verdict might be set aside, and a new trial had. The learned Serjeant was now called upon by the court to support his rule. He submitted, that, inasmuch as Wilson was not the attorney for the plaintiff in the cause, but had only acted in the capacity of his agent in obtaining his discharge under the Insolvent Debtors' Act, he could not object to produce the receipt.

Lord Chief Justice BEST. All confidence between attorney and client would be utterly destroyed, if the attorney were held to be liable to be called upon to produce documents that have come to his possession, or to prove facts that have come to his knowledge, in his character of attorney. All that is held by the attorney must be considered as being still in the hands of his client.

Rule discharged.(a)

(a) Communications made by a party to an attorney are confidential, although not relating to a cause existing, or in progress at the time they are made. In *Cromack v. Heathcote*, 4 J. B. Moore, 357, S. C. 2 Brod. & Bing. 4, where an attorney was applied to by a father to prepare a deed by which his property was to be assigned to his son, and, being informed that there was no consideration for the assignment, the attorney refused to prepare the deed, and it was afterwards drawn by another—it was held, that the attorney was precluded from giving evidence of these facts in an action afterwards brought by the son, wherein the validity of the deed was attempted to be disputed, although he was not the attorney in the cause.

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Millaspie

ABATEMENT.

See EVIDENCE, 5. MISNOMER.

ABSENT DEBTOR.

See PRACTICE, 19.

ACTION ON THE CASE.

See NUISANCE, 2.

1. In an action for running down a vessel, the plaintiff cannot recover unless the injury is attributable entirely to the fault of the defendants: if he were partly in fault, but the defendants with care might have prevented the accident, he cannot maintain his action. *Vanderplank v. Miller.* 498
2. An action commenced before 1st January, 1829, but tried after that day, on such a representation, made by parol before the statute 9 G. 4, c. 14, is maintainable. *Fellowes v. Williamson.* 528
3. In case by a reversioner for an injury to the reversion, it is no answer that the injury complained of was caused by the wrongful act of the tenant, for which he might be liable to an action. *Egremont v. Pulman.* 551
4. In an action for an injury to the plaintiff's premises, in consequence of the pulling down of the defendant's house adjoining, the plaintiff may recover damages for any injury actually caused by the negligence of the defendant, although he has not himself used those precautions which it was his duty to adopt against such injury. *Waters v. Pfeil.* 544

AFFIDAVIT TO HOLD TO BAIL.

1. An affidavit of debt stated that the plaintiffs had furnished goods to the amount of 2000*l.* to one N., for whom the defendant undertook to be answerable; that N. had since failed, and paid a dividend of four shillings in the pound only; and that 1600*l.* remained due to the plaintiffs:—Held sufficient. *Collins v. Wallis.* 606
2. An affidavit to hold to bail, stating that the defendant is indebted "for goods sold and delivered by the plaintiff to the defendant," is

sufficient, though it omit to add "at his request." *Rowley v. Bayley.* 611

3. It is sufficient if an affidavit of debt, made by one of the assignees of a bankrupt, state that the defendant is indebted, &c., as appears by the books of the bankrupt, and as the deponent verily believes; without alleging that the books are in the deponent's possession. *Hatton v. Bristow.* 619

AMENDMENT.

Where a judgment is stated in the record as of one court, and it appears by the production of an examined copy to have been obtained in another, the Judge at nisi prius may order the record to be amended under the 9 G. 4, c. 15. *Briant v. Eicke.* 543

ANCIENT LIGHTS.

See NUISANCE, 2.

In an action of trespass for removing boards, on a plea of justification that they obstructed an ancient window through which the light ought to pass, it is sufficient to show that the window was one through which the light ought to be allowed to pass, though the window is proved to have been erected within living memory. *Penwarden v. Ching.* 549

APPEAL.

Three several appeals involving the same facts, and the same question of law, having been entered for hearing at sessions, and the appellants having agreed that the decision of the Court on one should bind the other cases, and the sessions having by a majority of justices decided with the respondent in the first:—Held, that the Court would not compel the sessions to hear the other cases, although the justices had granted a case, but not upon any doubt of their own as to the propriety of their decision. *Rez v. Justices of Worcestershire.* 588

ARBITRAMENT.

An award cannot be objected to on account of anything that does not appear on the face

of it. Therefore, where an arbitrator had awarded to an apothecary in London charges for attendance, the Court refused to refer back the award to him for reconsideration. *Gensham v. Germain.* 603

ASSUMPSIT.

By writing not under seal, A. agrees, in consideration of 7000*l.*, to present the nominee of B. to the next turn of a rectory, and to furnish an abstract of title to, and execute a conveyance of, the next presentation, to B.: such a writing is only an agreement, not a conveyance, and does not require an *ad valorem* stamp. Afterwards A., by consent of B., agrees to sell the next presentation to C. for 7500*l.*, on having such a title as A. had received, C. paying to B., absolutely, on a day certain, the odd 500*l.* A. furnishes an abstract of such title as he had received, which C. refuses to accept, and no conveyance is tendered to him. B. sues C. for the 500*l.* There is a good consideration to support the action. And having done all that his contract required, it is no answer to the action that no conveyance was tendered to C. *Wilmet v. Wilkinson.* 596

ATTORNEY.

1 An attorney's clerk is not privileged from answering whether he has received a particular paper from the client.

An attorney may prove his bill under a commission of bankrupt, without delivering a signed bill. *Eicke v. Notes.* 527

2 An action on an attorney's bill cannot be maintained for professional business against an attorney without delivering a signed bill previous to the action.

But an item for money lent may be separated from the professional items and may be recovered. *Heming v. Wilton.* 579

3. By the master's allocatur an attorney was ordered on the 12th May to pay over to his client a sum of 15*l.*; on the 20th June the attorney became bankrupt, and afterwards obtained his certificate:—Held, that it was then too late to move for an attachment for not paying the money pursuant to the master's allocatur. *Baron v. Martell.* 594

4. The defendant employed the plaintiff, an attorney, to conduct a suit for his son. On the trial of the cause, the attorney called the defendant as a witness, and, lest he should be objected to as incompetent, by reason of interest, he prepared a release:—Held, that the conduct of the plaintiff was a fraud upon the Court, and that he was not entitled to recover. *Williams v. Goodwin.* 607

5. An attorney of the King's Bench, arrested at the suit of an attorney of this Court on process out of this court, will not be discharged on motion, but must plead his privilege. *Adams v. Bugby.* 643

6. An attorney, who has in that character received papers from a client, cannot be called to produce them in a cause, although he does not act therein as the attorney of the party. *Parker v. Yates.* 647

AUCTION.

On the sale of an estate by auction, the name of the owner did not appear in the particulars or conditions of sale, and the agreement signed by the purchaser did not mention the

owner's name, and was not signed either by him or the auctioneer: *semble*, that the seller cannot maintain an action for the non-completion of the contract.

If the owner of an estate put up for sale by auction employ a person to bid for him, the sale is void, although only one such person be employed, and although he is only to bid up to a certain sum, unless it is announced at the time that there is a person bidding for the owner. *Wheeler v. Collier.* 487

AWARD.

See ARBITRAMENT.

BAIL.

See PRACTICE, 6.

1. Where time was applied for to send an affidavit of justification into the country, to amend a mistake in the jurat, the Court made the attorney pay the costs of the application. *Skillicoe's Bail.* 583

2. Time allowed to add and justify bail by Habeas Corpus, where one of the bail of whom notice had been given, was taken suddenly ill. *Gillbank's Bail.* 583

3. Bail cannot justify for a defendant brought into Court to be charged in execution in the cause. *Bireham v. Chambers.* 608

4. The defendant was held to bail on a bill of exchange. The Court refused to order the bail-bond to be delivered up to be cancelled, on an affidavit that the bill was founded and given on an usurious transaction. *Isaacs v. Silver.* 610

BANKRUPT.

See BILLS OF EXCHANGE, 13. EVIDENCE, 12, 21. WITNESS, 5.

1. In an action by assignees of a bankrupt for a demand for which the bankrupt, if solvent, might sue, the depositions are conclusive evidence of the matters contained in them, unless the bankrupt, within the time prescribed by the statute 6 Geo. 4, c. 16, s. 92, gives notice of his intention to dispute the commission, although the action was commenced, and notice given by the defendant that he would dispute the act of bankruptcy, &c., within the time allowed to the bankrupt to give such notice, if the cause be not brought to trial till after that time is elapsed. *Earlth v. Schroder.* 462

2. Where a petitioning creditor's debt arises on a note endorsed, or a bill accepted, by the bankrupt, evidence must be given that the endorsement or acceptance was prior to the act of bankruptcy: the mere production of the instrument, bearing an earlier date, is insufficient.

On a commission issuing on May the 14th, a dealing on March the 14th is valid, as "more than two calendar months" before the issuing of the commission. *Cowie v. Harris.* 490

3. A transfer of goods in warehouse by a bankrupt to A. & Co. by mistake for A. & Son, more than two months before the issuing of a commission, but corrected within two months, vests the property in the goods in A. & Son from the time of the first transfer, under the 81st section of 6 G. 4, c. 16.

A commission issued and not acted on nor gazetted, is sufficient to defeat a transaction

- within two months of it, under the proviso of the 81st section. *Packham v. Lashmoor*. 517
4. A fraudulent delivery of goods is not an act of bankruptcy, unless it be in the nature of a gift or transfer; so that when goods are removed with intent to delay a creditor, but the party to whose custody they are given has no claim given to him over them, this is not an act of bankruptcy.
- At all events such delivery of goods by his agent, carrying on his business, without his direction, is no act of bankruptcy. *Cotton v. James*. 520
5. Under the 6 G. 4, c. 16, s. 127, no action can be maintained against a certificated bankrupt for a debt due before his commission, although he has compounded with his creditors before his commission, and his effects have not produced 15s. in the pound under it. *Eicke v. Nokes*. 527
6. The declaration of a bankrupt on his return, that he had absented himself to avoid a writ against him, is sufficient evidence of an act of bankruptcy, without any other proof of the existence of the writ, or of the debt on which it was founded, or of creditors of the bankrupt. *Newman v. Stretch*. 540
7. Where a bankrupt in the habit of supplying his son with money to pay his bills, gave him 200*l.* for that purpose just before he stopped payment, being at the time insolvent, but not expecting to become bankrupt: Held, that the question for the jury in an action by his assignees against the son to recover that money is, whether it was given in the ordinary course of maintaining the son, or as a fraudulent preference of the son over the creditors, made in contemplation of insolvency. Such gift of money is not within the 6 G. 4, c. 16, s. 73. *Abell v. Daniell*. 547
8. A debt for money lent on mortgage, conditioned for payment after six months' notice, such notice not to expire before a certain day, is a good petitioning creditor's debt to support a commission sued out before that day. *Hill v. Harris*. 563
9. If a trader in his own house hears himself denied to a creditor, and does not come forward, this, if done with intent to delay creditors, is an act of bankruptcy, though he has given no directions to be denied. *Smith v. Moon*. 563
10. Assignees of a bankrupt cannot recover in trover goods delivered upon a transaction which the bankrupt himself could not impeach, unless the delivery is subsequent to an act of bankruptcy taking place after the petitioning creditor's debt has accrued.
- Where the bankrupt, after a secret act of bankruptcy, bought on credit and sold for ready money, at unduly low prices, the purchasers were held not protected by 6 G. 4, c. 16, s. 82, unless the purchase was in the usual course of business.
- And if the purchaser knew the price to be greatly under the value of the commodity, it is not within the protection of the statute. *Ward v. Clark*. 574
11. A certificate obtained after 6 G. 4, c. 16, on a commission of bankruptcy issued before that statute, is proved by the production of the certificate duly allowed. *Taylor v. Welsford*. 574
12. Where the goods of a bankrupt taken in execution are discharged by payment of the sum to be levied by a creditor after a docket struck, the assignees subsequently chosen,

- cannot, by repaying that sum, maintain an action for money had and received against the sheriff. *Bucker v. Booth*. 577
13. A commission of bankruptcy may be supported on a petitioning creditor's debt on a balance of accounts which continue running up to the commission and always against the bankrupt to the extent of 100*l.*; though payments have been made sufficient, if applied in the order of time, to discharge the particular balance actually due at the time of the act of bankruptcy. *Shaw v. Harvey*. 578
14. A debtor appointing a time and place to meet and pay his creditor, and failing to keep the appointment, must be presumed, in the absence of evidence to the contrary, to have absented himself with intent to delay his creditor, and thereby commits an act of bankruptcy; and in an action by a bankrupt against his assignees to try the validity of the commission, the plaintiff must give evidence to rebut the presumption, or he cannot maintain the action. *Widger v. Browning*. 594
15. Where assignees under a second commission of bankrupt have refused to interfere, and the bankrupt has not paid 15s. in the pound, but has effects whereon to levy, a creditor may take out execution upon a judgment recovered before the second commission. *Austin v. Deniford*. 596
16. A creditor called upon the bankrupt by appointment. The bankrupt left the room and did not return, and the wife told the creditor that he had gone out:—Held, that this was sufficient evidence to warrant the Jury in inferring that the bankrupt left his house with intent to avoid a creditor. *Cherrington v. Brown*. 607
17. The 6 Geo. 4, c. 16, s. 131, provides that no bankrupt, after the allowance of his certificate, shall be liable to pay any debt barred by such certificate, upon any promise made after the suing out of such commission, unless such promise be in writing, signed by the bankrupt, or by some person authorized in writing by him:—Held, that a promise in the handwriting of the bankrupt, but bearing no signature, was not sufficient to take a case out of the statute. *Hubert v. Moreau*. 642

BARON AND FEME.

In an application against a husband for goods supplied to his wife living separate from him, the plaintiff must give evidence of the circumstances of the separation, to show that they were such as to authorize her to bind the husband. *Mainwaring v. Leslie*. 461

BILLS OF EXCHANGE AND PROMISSORY NOTES.

See EVIDENCE, 1, 3.

1. A. and Co. having accepted a bill for B.'s accommodation, B. paid it into the hands of his bankers without notice, who retained possession of it for several years, charging him with interest for it, but never debiting him with the amount of the bill. During this time, they became bankers to A. and Co. also, but never gave them notice that they held the bill against them. The balance of B.'s account was always against him; that of the account of A. and Co. in their favour, but very seldom to the amount of the bill. In an action by the bankers against A. and Co., held, that, under these circumstances, the defendants were not discharged unle

the jury should infer that the plaintiffs had entered into an agreement to discharge the defendants, or had expressly renounced all intention of holding them liable on the bill.

If a bill is addressed to "A. and B." by the name of "A., B. and Co.," and they accept it by the name of "A. and B.," and the address of the bill is afterwards altered to "A. and B." this is an immaterial alteration, and does not discharge the acceptor. *Farquhar v. Southey.* 460

2. Assumpsit on a charter-party, "freight to be paid partly in cash, and partly by approved bill." The owner took, without apprising the defendants, a bill from the consignee of the cargo for part of the freight, which was dishonoured: Held, that the defendants were not discharged thereby from the amount of the bill. *Taylor v. Briggs.* 463

3. A party receiving notice of dishonour of a bill of exchange need not give notice to the party above him till the next post after the day on which he himself receives the notice, although he might easily give it that day, and there is no post on the day following. *Geill v. Jeremy.* 472

4. A foreign note is negotiable in England by endorsement, by virtue of the stat. 3 & 4 A. c. 9.

A promissory note is not admissible in evidence under the money counts in an action by the endorsee against the maker. *Bentley v. Northouse.* 474

5. In an action by the endorsee against an endorser of a bill of exchange, where the defendant proves usury in the concoction, or in a previous transfer of a bill, the plaintiff must prove himself a bona fide holder, though he has received no notice to prove consideration. *Wyatt v. Campbell.* 478

6. In an action on a bill of exchange, accepted for the accommodation of the drawer, who has become bankrupt and obtained his certificate, the latter is a competent witness for the acceptor. *Ashton v. Longes.* 488

7. A paper in these words, "Mr. L., please to let the bearer have 7l., and place it to my account, and you will oblige your humble servant, R. S.," is not a bill of exchange. *Little v. Slackford.* 498

8. An endorsee of a bill or note taking it under an agreement not to sue the endorser cannot sue such endorser, though the endorsement be unqualified. *Pike v. Street.* 514

9. In an action by the endorsee against the acceptor of a bill of exchange, the defendant may show that the bill was originally given without consideration, though he has given no notice of disputing the consideration. *Mann v. Lent.* 516

10. A bill of exchange drawn by A. payable to his own order, and accepted by B. generally, was altered, with the consent of B., while it continued in the hands of A. by the addition of a particular place of payment to the acceptance. This alteration does not vitiate the bill so as to prevent the acceptor from being liable on it. *Stevens v. Lloyd.* 524

1. In an action on a promissory note, and also for goods sold and delivered, if the plaintiff prove the delivery of the goods before the note was given, and do not show the consideration of the note to have been distinct from them, the defendant must have a verdict on one of the counts: the plaintiff cannot take a verdict on one, and have the jury discharged from giving a verdict on the other. *Mutrie v. Harris.* 534

12. In an action by the endorsee against the acceptor of a bill of exchange, the bill is not admissible as evidence of money had and received. *Eales v. Dicker.* 535

13. In an action by the drawer against the acceptor of bills of exchange, given for goods supplied, which were to be "of good quality and moderate price," and were estimated at about 400l., and the bills given for that amount, it is no defence that the goods turned out to be worth much less than the estimated price, and that the acceptor has paid more than the real value of the goods on the bills.

It is *prima facie* evidence that a promissory note was in existence before an act of bankruptcy, that it is proved to have been in existence before the docket is struck, and bears date on the face of it before the act of bankruptcy. *Obbard v. Betham.* 569

14. An acceptance of the debtor taken as payment by the creditor must be taken as a discharge if not proved to be destroyed, although it is proved to be lost, and although the creditor offer to indemnify by rule against any claim on the bill. *Woodford v. Whiteley.* 576

15. In an action by the endorsee against the endorser of a bill of exchange, evidence of an acknowledgment of an existing debt and of a promise to pay by the defendants, is admissible and sufficient to support a count upon an account stated. *Wagstaffe v. Boardman.* 589

BILL OF LADING.

See FREIGHT, 2.

BLOCKADE.

See INSURANCE, 1.

BOND.

See EVIDENCE, 10.

BROKER.

See EVIDENCE, 4.

CANALS.

See TOLL.

COMMON RECOVERY.

See pages 612, 616, 632, 639, 643.

CONSTRUCTION OF DEEDS.

1. Provisoes for re-entry in a lease are to be construed like other contracts; not with the strictness of conditions at common law. *Loe dem. Davis v. Ekiam.* 504

2. A condition in articles of sale, "that any error in the particulars shall not vitiate the sale, but a compensation shall be made," only applies to cases where the circumstances afford a principle by which this compensation can be estimated.

Therefore, on the sale of a reversion expectant on the death of A. B. without children, an error in the statement of A. B.'s age does not come within the condition (as it would if the reversion were simply expectant on A. B.'s death), because it affects the probability of the other contingency, which is not a subject of calculation; and the purchaser is entitled to rescind the contract. *Sherwood v. Robins.* 505

CONSTRUCTION OF STATUTE.

1. The statute of 14 & 15 H. 8, c. 5, appointing and regulating the college of physicians, in a public act. *College of Physicians v. Harrison.* 504
2. In 7 & 8 G. 4, c. 29, s. 38, the words "adjoining any dwelling-house," import actual contact; and, therefore, ground separated from a house by a narrow walk, and paling with a gate in it, is not within their meaning. Whether ground be properly described as a "garden," within the same section, is a question for the jury.
The words "plant," and "vegetable production," in s. 42, do not apply to young fruit-trees. *Rex v. Hodges.* 541
3. The statute 6 G. 1, c. 18, s. 12, did not extend to prevent partners from lending money on respondentia. *Gore v. Wynne.* 548
4. East India Company's warrants are not negotiable instruments within the 6 G. 4, c. 94, s. 2, as they pass by delivery and not by endorsement. Where defendants, receiving a pledge from a factor for an antecedent debt, sell it, they cannot under 6 G. 4, c. 94, s. 3, hold the proceeds against the real owner, but are liable to him in trover: but in estimating the damages they are entitled to credit for the balance, if any, due from the owner to the factor. *Taylor v. Trueman.* 563
5. The statute 24 Geo. 2, c. 18, s. 1, whereby the Judge, by certifying that the cause was a proper one to be tried by a special jury, may relieve the party applying for such special jury from the expenses, does not extend to a case where the record is withdrawn. *Clements v. George.* 619

CONTEMPT.

Exhibiting in an assize town inflammatory publications respecting a crime about to be tried at the assizes is not a contempt which the judge of assize can interfere to stop by committing the party exhibiting. *Rex v. Gilham.* 496

COPYHOLD.

Quere, whether the lord of a manor may, in general, make grants of the waste upon which the copyholders have a right of common, provided he leave sufficient for the copyholders.

A special custom that he may, leaving sufficient for the copyholders, would be good.

Semble, that a special custom that he may, without limit, would be bad. *Arlett v. Ellis.* 600

COSTS.

See GUARANTEE, 1.

1. The Court, without a Judge's certificate, will not enter a suggestion on the roll to deprive the plaintiff of his costs under 5 Geo. 4, c. 106, in an action where the defendant resided in Wales at the time of serving process, although the sum recovered was under 50l. *Mortimer v. Harris.* 596
2. A plaintiff in prohibition obtaining judgment after demurrer, is not entitled to costs, except his case is within 8 & 9 W. 8, c. 11, s. 3; and if the judgment he obtains is for a partial prohibition, and a partial consultation, his case is not within that statute. *Free v. Burgoyne.* 596
3. The plaintiff, an attorney, arrested the defendant for 100l., the amount of a bill of costs delivered, and served him with a copy of the

declaration. The defendant pleaded the general issue, on which issue was joined. At the trial, the amount of the bill was, by consent of the parties, referred to the prothonotary to be taxed, and he found that 60l. only was due, as the plaintiff had neglected to take out his certificate, for a part of the time during which the business was done:—Held, that the defendant was not entitled to his costs under the statute. *Hinton v. Warren.* 625

COURT OF REQUESTS.

Trover is not a cause of action within the operation of the Bath Court of Requests act, 45 G. 3, c. 67. *Weare v. Calder.* 596

CRIM. CON.

In an action for crim. con. at the suit of a Quaker, proof of a marriage according to the forms of that society is sufficient to sustain the action. *Deane v. Thomas.* 544

DECLARATIONS.

See EVIDENCE, 6.

DEED.

See EVIDENCE, 31.

DEMURRAGE.

If a bill of lading stipulate for the payment of demurrage by the consignee of goods after a limited time from the ship's arrival, and his goods are so stowed as not to admit of delivery immediately on arrival, the consignee must have a reasonable time to discharge them, and is not liable to demurrage till after such reasonable time, though the stipulated period has elapsed from the ship's being ready to deliver her cargo generally. But after such reasonable time, he is liable, though the stipulated period has not elapsed, if computed from the time when the discharge of his own goods might have commenced. *Rogers v. Hunter.* 472

DEVISE.

J. L. devised to his son J. H. L. for life; remainder to trustees to preserve contingent remainders; remainder to the second, third, fourth, fifth, and all and every other the son and sons of his said son J. H. L. in tail male, according to seniority of age and priority of birth. There was no limitation to the first son of J. H. L. The declaration of the trust contained a provision to raise money for the daughters of J. H. L. on failure of issue male of his body; and the will also provided that in case J. H. L. should have any child or children other than and except an eldest or only son, then J. H. L. might raise money for portions:—Held, that the first son of J. H. L. took no estate under the will. *James Haughton Langston v. Sir Charles Morice Pole, Bart., Haughton Farmer Okcover, Maria Sarah Langston, Charles Barter the elder, and Elizabeth Catharine his Wife, and Charles Barter the younger, an infant, by his guardian.* 590

DISTRESS.

1. Where a party distrains for more rent than is due, but takes only a single chattel, he is not liable to an action for distraining for more than is due, though the thing taken be

of greater value than is necessary to cover the rent actually due, unless there were others of less but sufficient value to be found.

The appraiser of a distress must be sworn before the constable of the parish where it is taken; the constable of the adjoining parish cannot interfere, though the proper constable is not to be found when wanted. *Avenell v. Croker and Another.* 499

2. A landlord may maintain an action on the statute 11 G. 2, c. 19, § 3, for double the value of goods fraudulently removed to prevent a distress, although they be worth less than 50l.; he is not confined to his remedy by application to two magistrates. *Bromley v. Holden and Another.* 500

3. In replevin, if there be any affirmative issue on the plaintiff, he is entitled to begin.

A tenant from year to year, underletting from year to year, has a reversion which entitles him to distrain. *Curtis and Others v. Wheeler and Another.* 572

4. On an avowry of a distress as made under 11 G. 2, c. 1, on goods fraudulently removed, the defendants must prove that there was no sufficient distress left on the premises. *Parry v. Duncan and Others.* 580

EJECTMENT.

1. In ejectment on a clause of re-entry for non-payment of rent, if the landlord shows that he was prevented by the defendant from entering on the premises to distrain, he is entitled to recover, under the stat. 4 Geo. 2, c. 28, s. 2, without showing that there was actually no sufficient distress on the premises. *Doe d. Chippendale and Others v. Dyson and Another.* 478
2. The plaintiff in ejectment is bound to produce the rule to confess lease, entry, and ouster, as part of his case. *Doe, on the demise of Lamble, v. Lamble.* 462

EMBEZZLEMENT.

One gratuitously engaging to procure the discount of a bill, not being in any business within which such an employment regularly falls, cannot be convicted of embezzling the bill deposited with him for the purpose of procuring such discount, under the statute 52 Geo. 3, c. 63. *Rex v. Daniel Prince.* 462

ESCAPE.

In an action for an escape, on final process, the defendant may show, on the general issue, that the escape was by the fraud and covin of the party really interested in the judgment.

Or if he plead that it was by fraud and covin of a person unto whom and to whose use and benefit the judgment was assigned, this is sufficiently proved by showing that the judgment was assigned to the use and benefit of that person, though the assignment was in form made to another. *Hiscocks v. Jones, Esquire.* 518

EVIDENCE.

See ATTORNEY, 6. BANKRUPT, 2. BILLS OF EXCHANGE, 12, 15. LIBEL, 1, 5. PRACTICE, 14. PRINCIPAL AND AGENT, 1, 3. SLANDER, 1. WITNESS, 1.

1. An examined copy of a letter containing notice of the dishonour of a bill of exchange

which is not produced, nor the subject-matter of the action, is not admissible without notice to produce the letter sent. *Lanauze v. Palmer.* 464

2. A demurrer or bill in equity does not so admit the facts charged in it, as to be evidence against the defendant of those facts in a future action between the same parties. *Tompkins v. Askby.* 464

3. The signature of a party to a bill of exchange may be proved by a person who has seen him write his surname only. *Lewis and Another v. Sapio.* 466

4. Where a broker effects a sale between two parties, the bought and sold notes delivered to them, and not the entry in his books, are the proper evidence of the contract. *Thornton and Others v. Menz.* 467

5. On a plea in abatement of the non-joinder of A. B. as a defendant, his declarations made before action brought are evidence in support of the plea. *Clay v. Langslow and Others.* 468

6. The declarations of a party suing as assignee of a bankrupt, made before he became such, are not admissible against him. *Fenwick and Others, Assignees of Dacey, v. Thornton.* 470

7. Proof of the handwriting of the subscribing witness to an instrument is sufficient, he being dead, without any further proof of the identity of the parties, except the identity of name and description. *Page v. Mann and Another.* 478

8. Where the practice of the defendant's counting-house was that the clerk, after copying a letter into the letter-book, returned it to the defendant to seal, and that he or another clerk carried all letters to the post-office, but there was no particular place of deposit in the office for such letters, and neither of the clerks had any recollection of the particular letter offered in evidence, though they swore that they uniformly carried all letters given them to carry: Held, that the entry in the clerk's writing in the letter-book of a letter to the plaintiff could not be read as proof of such letter having been sent to the plaintiff. *Toosey, Administratrix of Toosey, v. Williams.* 489

9. Evidence that an advertisement was inserted in a country newspaper circulated at the residence of a party, is not admissible as proof of notice to the party of the facts contained in the advertisement, unless it be shown that he took the newspaper in. *Norwich and Lowestoft Navigation v. Theobald.* 491

10. Where the attesting witness to a bond cannot be produced, proof of his signature is sufficient evidence of the execution by the defendant, the obligor, though the defendant only signs by mark. *Mitchell, Executor, &c., v. Johnson.* 500

11. An acknowledgment of a debt, without specifying any amount, is not sufficient to entitle the creditor to nominal damages on a count upon an account stated. *Bernasconi and Others, Assignees of Chambers, v. Anderson and Ux. Administratrix of Anderson.* 502

12. In an action by assignees of a bankrupt, where there are some counts or causes of action on which the bankrupt might have sued, and others on which he could not, the proceedings under the commission are admissible in evidence, if the plaintiffs elect to

proceed only on those counts which the bankrupt might have sustained. *Jones and Others, Assignees of Wild, v. Fort.* 506

13. Letters, bearing post-marks before the act of bankruptcy, and found in the alleged bankrupt's possession after it, containing statements of matters material to the act of bankruptcy, are admissible without calling the writer as evidence against the alleged bankrupt, to show that he received intimation of these facts, though not to prove their truth. *Cotton v. James.* 520

14. Where a court prints and circulates copies of its rules for the guidance of its officers, the production of one of these printed copies is good evidence of the rules which the officers are to act on, though the original rules are kept under the seal of the court, and the copy is not shown to have been examined with the original. *Dance v. Robson and Others.* 525

15. In an action for a libel, which is only libellous on a man in the execution of his office, where the plaintiff has stated, by way of inducement, his due discharge of its duties, the defendant cannot, on the general issue, give evidence of negligence in discharging them in answer to that allegation. 525

16. On a written agreement for the hire of a vessel to be made ready to take on board "forthwith," evidence is inadmissible to show that the parties agreed that the vessel should be ready in two days. But evidence of the known circumstances of the vessel is inadmissible to show how soon she might reasonably be expected to be ready. *Simpson and Another v. Henderson and Another.* 526

17. It is not sufficient evidence of delivery of a signed bill at the defendant's abode, that a signed bill is delivered at a particular place not shown to be his abode, and that he afterwards gives this to his present attorney, who attends the taxation of costs.

The defendants having signed an admission of the debt to enable the attorney to prove it under a commission of bankrupt then subsisting against him, is no admission of the delivery of a signed bill, and does not dispense with the necessity of such proof in an action subsequently brought against him for the same claim. *Eicke v. Nokes.* 527

18. In case for a false representation of the solvency of A. B., whereby the plaintiffs trusted him with goods; their declarations, at the time, that they trusted him in consequence of the representation, are admissible in evidence for them. *Fellowes and Another v. Williamson.* 528

19. In an action against partners, on a bill of exchange, where the defence is, that one partner, with the knowledge of the plaintiff, accepted the bill in the partnership firm for his private debt; other bills of exchange, accepted by that partner and paid by the other, are not so necessarily connected with the subject of the trial as to render a notice served on the attorney of a defendant, too late for him to procure the bills from the defendant himself, sufficient to let in secondary evidence. *Bate v. Russell.* 538

20. The deposition of a witness, taken in a judicial proceeding, in the presence of the party there charged, is not admissible in another proceeding against that party on the ground that he was present, and had the op-

portunity of cross-examining. *Melen v. Andrews and Another.* 540

21. In an action to recover money paid by a bankrupt in contemplation of bankruptcy, on the ground of fraudulent preference, declarations of the bankrupt as to the state of his affairs, made about the time of the transaction, but unconnected with it, are receivable in evidence.

So also are letters received by him refusing to advance him money, for the purpose of showing the fact of such refusal, not as evidence of other facts stated in them. *Vacher and Another, Assignees of Window, v. Cocks and Others.* 542

22. The title of three, claiming as executors, is well evidenced by the probate granted to one only, of the will appointing them all. *Walters and Others v. Pfeil.* 544

23. The stat. 47 G. 3, sess. 2, c. 68, s. 29, provides, that all contracts for the sale of coals at the London coal market shall be signed by the buyer and the factor; that the factor shall deliver a copy of the contract to the clerk of the market; and that the clerk shall enter it in a book. The 32d section makes such entries "evidence in all cases, suits, and actions touching anything done in pursuance of this act." Held, that the production of such an entry of a contract, purporting to be signed by the buyer and factor, is not evidence of the sale, in an action brought for the price of coals, unless the buyer be proved aliunde to have signed the contract. *Brown v. Capel and Another.* 547

24. A book kept in the chapter-house of the dean and chapter of Sarum, purporting to contain copies of leases granted by the dean and chapter, is, as a public book, evidence of those leases for the purpose of reputation, without proof of possession under the leases. *Combs v. Coether and Wheeler.* 549

25. If the examination of a prisoner taken in writing is inadmissible by reason of irregularity, parol evidence of what he said at the time of the examination may be received. *Rex v. Reed.* 550

26. Where a man is employed to do work under a written contract, and a separate order for other work is afterwards given by parol during the continuance of the first employment, the written contract need not be produced by the plaintiff in an action for the second work. *Reed v. Another v. Batte.* 552

27. An old deed between a public body claiming tolls and others liable thereto, regulating the amount of payment, is evidence in the nature of reputation of the existence of the tolls.

In an action for tolls claimed by a Corporation, an ancient schedule produced from among their muniments, copies of which were delivered by their officer to the lessee of the tolls, and by the lessee to the collectors, by which they have actually collected, is admissible in evidence for the Corporation.

Contra, when the copies in the hands of the lessee are not shown to have been delivered to him from the Corporation, although they correspond accurately with the old schedule.

An act of parliament, private in its nature, is not made admissible in evidence against strangers by a clause declaring "that it shall be deemed and taken to be a public act, and shall be judicially taken notice of with-

out being specially pleaded." *Brett v. Beales and Others.* 553

28. An offer of a specific sum by way of compromise is admissible in evidence, unless accompanied with a caution that the offer is confidential. *Wallace and Others v. Small and Others.* 562

29. Where a deed purported to be made "in consideration of esteem for A. T., and for divers other good considerations," evidence is admissible that it was made in consideration of an intended marriage with A. T. And it is admissible evidence of this. *Tull v. Parlett.* 566

30. An instrument executed by mark may be proved from inspection by a person who has seen the party so execute instruments. *George v. Surry.* 576

31. The attesting witness to a deed stated, that he knew the defendant, one of the parties, that the attestation was in his (the witness's) handwriting, that he did not know whether or not the signature to the deed was the defendant's handwriting, but that he would not have put his name to it unless he had seen him execute it:—Held, sufficient proof of the execution. *Dee d. Smyths v. Claxton.* 610

32. In trespass for taking and carrying away furze, the defendant pleaded the general issue, and several special pleas, in which he claimed a right to estovers from a common: Held, that under the general issue, he might give evidence of an exclusive right of possession: Held, also, that persons who had a right of common were competent witnesses for the defendant to prove that he was entitled to the exclusive possession of the land from which the furze was taken by the plaintiff. *Pearce v. Lodge.* 626

33. Where scientific men are called as witnesses, they are not entitled to give their opinions as to the merits of the case, but only as to the facts proved at the trial. *Jameson v. Drinkald.* 636

EXECUTOR.

See EVIDENCE, 22.

1. In assumpsit against several defendants, as executors, with plea of ne unques executors, the plaintiff may have a verdict against the real executor on the counts laying the promises by the testator, and the other defendants must be discharged. *Griffiths v. Franklin and Fiestall, Executor and Executrix of Fiestall.* 490

2. On a plea by several executors that they have fully administered, if some are shown to have assets in their hands, and the others not, the latter are entitled to a verdict. *Parsons v. Hancock and Others, Executors and Executrix.* 538

FINE.

Where premises were described in a fine to be in the parish of A., whereas, they were in fact in the parish of B., being in a certain street, part of which was in A., and part in B.; and the deed to lead the uses stated the premises to be in that street, in the parish of A. The Court, on an affidavit of the facts, allowed the fine to be amended, by altering the name of the parish from A. to B. *Hawker, Deforciant.* 615

FREIGHT.

1. On a bill of lading of goods "shipped by A. B. to be delivered to C. D. or his assigns, he or they paying freight;" if the goods are delivered without receiving freight, the shipper is not liable for the freight, there being no charter-party.

In such a case, where the shipper afterwards promised, by writing, to pay freight, Held, that it was a question for the jury, whether on the account between A. B. and C. D., A. B. was, as between them, to pay the freight; and that, if he had consented to do so, he was liable on the subsequent promise. *Drew and Another v. Bird.* 492

2. An endorsee of a Spanish bill of lading to whom the goods have been delivered under it, is liable in assumpsit for the freight, although the bill of lading is for delivery to the consignees, without saying "or their assigns," such bills of lading appearing by evidence to be usually passed by endorsement. *Renteria v. Ruding and Another.* 575

GUARANTEE.

1. A person indemnified cannot charge the person indemnifying with the costs of defending an action for a debt clearly due, unless authorized by him to defend. Quære whether an attorney may lawfully guaranty the petitioning creditor against the expense of working the commission of bankruptcy on condition of being employed as attorney in it. *Gillet v. Rippon, Gent. One, &c.* 551

2. In an action on a guarantee for the price of gold to be supplied to a working goldsmith in the course of his business, where the goldsmith had been in the habit of endorsing bills of exchange to the plaintiff, and obtaining from him their amount, partly in gold at the usual credit price, and partly in money deducting the usual discount: Held that it was a question for the jury, whether these transactions were in substance a sale of the gold, or whether that was only colourable and the real transaction a mere discount of the bills. *Evans v. Whyte.* 565

3. A guarantee was given by the defendant, in consideration of the plaintiffs' giving A. a current credit, to make good, upon the event of his failure, any deficiency, not exceeding a certain sum. A short time after the guarantee was given, a bill, which had been previously given by A. to the plaintiffs, was dishonoured, and the plaintiffs permitted him to renew it without giving any notice of the transaction to the defendant:—Held, that this was not such a failure of the principal as to entitle the surety to a notice of the renewal of the bill. *Carr and another v. Brown.* 632

HANDWRITING.

See EVIDENCE, 3.

HUNDRED.

Where the owner of property destroyed by malicious fire gives in his examination on oath under the statute 9 G. 1, c. 22, it is not necessary, in order to enable the owner to recover against the hundred, that any other person should do so.

The provision that the servants having the care of the premises shall do so, only applies

to cases where the owner is away, and has no personal superintendence of the premises ; not to cases where he merely happens to be absent at the instant when the fire happens. *Rolfe v. The Inhabitants of the Hundred of Elthorne.* 503

ILLEGAL CONTRACT.

See GUARANTEE, 1.—PLEADING, 7.

INDICTMENT.

Where under a statutable offence time is material, the time stated in the indictment in arrest of judgment must be taken to be the true time, without a substantive averment.

Thus where a statute made it penal to exhibit lights to persons at sea, within a particular half of the year, an allegation that the party exhibited lights on a particular day in a particular month within that half year is sufficient. *R. v. Brown and Others.* 531

INSOLVENT DEBTOR.

1. In an action against the acceptor of a bill of exchange, who pleaded his discharge under the Insolvent Debtor's Act, the defendant having misdescribed the holder in his schedule, and there being some evidence tending to show that he knew the holder at the time : Held, that the true question for the jury was, whether he did so know the holder ? *Levy v. Delbell.* 508
2. The general assignment of the personal estate of an insolvent by the provisional assignee of the Insolvent Debtors' Court to the after appointed assignees, does not vest in the latter a term of years, unless they do some unequivocal act to manifest their acceptance ; a mere attempt to make it available to the estate is not such an exercise of ownership as to create an implication of assent. *Lindsay v. Lambert.* 641

INSURANCE.

1. A blockading squadron may lawfully lie at any distance convenient for shutting up the port blockaded, provided it does not obstruct any other ; and a ship will be considered as guilty of a wilful breach of the blockade which actually comes within reach of capture by the squadron, if the circumstances were such, that a prudent man would have inquired whether that were the blockading squadron, although the captain were actually ignorant of its being so, not having inquired. *Naylor and Others v. Taylor.* 509
2. A warranty to sail on or before a particular day, is not fulfilled, if the ship does not completely unmoor on that day, though she then has her cargo and passengers on board, and is quite ready to sail, and is only prevented doing so by stress of weather. *Neilson and Others v. Salvador.* 529
3. It is no defence to an action on a policy of insurance, that a misrepresentation was made of the cargo with which the ship was to sail on a future day, although, in fact, that representation induced the defendant to sign the policy, unless the misrepresentation was fraudulently made. *Plinn, Assignee of Krum, an Insolvent Debtor, v. Tobin.* 546
4. Proviso in a charter-party, that if the ship do not arrive at her port of loading on or before, &c., unless prevented by stress of weather or other unavoidable impediment, the freighter

should not be obliged to ship a cargo : Held, that if ordinary diligence were used in the voyage to reach the port of loading, the owners are within the exception of the proviso, though the ship is delayed till after the stipulated time by causes which extraordinary exertion might have counteracted. *Granger v. Dent.* 567

INTEREST.

Interest cannot be recovered on a judgment if the plaintiff might, by proper diligence, have procured payment. *Bann v. Dalsel.* 514

JOINT STOCK COMPANY.

The statute, establishing a particular company, provided that " the whole of the said sum of 100,000*l.* shall be subscribed before any of the powers and provisions given by the Act shall be put in force." The company made a call on the shares before the subscriptions were complete, and commenced an action for the call after they were so : Held, that such action was not maintainable ; the completion of the subscription list being necessary to enable the company to make the call, as well as to bring the action. *The Company of Proprietors of the Norwich and Lowestoft Navigation v. Theobald.* 491

JUSTICES.

The 2 Geo. 3, c. 28, which gives additional protection to justices in cases of actions brought against them for anything done in pursuance of that act, but which does not require notice of action, does not deprive them of their right to the notice required by the 24 Geo. 2, c. 44, which requires notice in cases of actions brought against justices for anything done in execution of their office. Therefore, where in an action against a magistrate, under the 2 Geo. 3, c. 28, the plaintiff proved service of a notice not perfectly conformable with the requisites of the 24 Geo. 2, c. 44, and was thereupon nonsuited : —Held, that the nonsuit was right. *Rogers v. Broderip, Esq.* 588

LANDLORD AND TENANT.

See DISTRESS, 2, 3.

1. Service of a notice to quit on a servant at the tenant's dwelling-house is sufficient, although the tenant be not informed of it till within half a year of its expiration. *Doc dem. Neville v. Dunbar.* 459
2. A. being in possession under a lease for years, underlet the premises from year to year to the defendants, who knew the extent of A.'s interest. The plaintiff afterwards took a lease of the same premises, expectant on the determination of A.'s term, and the defendant, after the determination of A.'s term continued in possession for a quarter of a year, when they paid the rent for that period, and claimed to give up the premises : Held, in an action for use and occupation for a subsequent period, that there was no evidence of a tenancy continuing beyond that quarter of a year. *Freeman v. Jury and Another.* 463

LIBEL.

See EVIDENCE, 15.

1. In an action for a libel, purporting to be a report of a coroner's inquest, evidence of the

- correctness of the report is admissible under the general issue, in mitigation of damages; but no evidence of the truth or falsehood of the facts stated at the inquest is admissible on either side. *East v. Chapman.* 468
2. A fair criticism on the works of a professional artist, in the course of his professional employment, is not actionable, however mistaken it may be: if it is unfair and intemperate, and written for the purpose of injuring the party criticised, it is actionable. *Soane v. Knight.* 477
 3. It is not libellous fairly and honestly to criticise a painting publicly exhibited, however strong the terms of censure used may be. *Thompson v. Shackell.* 503
 4. In an indictment for libel, the proprietor of a newspaper is *prima facie* answerable for what appears in it; but the presumption arising from proprietorship may be rebutted and an exemption established. *Rex v. Gutch, Fisher, and Alexander.* 553
 5. In an action on a libel for publishing a handbill offering a reward for the recovery of certain bills of exchange, and stating that A. B. is suspected of having embezzled them, it is a good defence on the general issue, that the handbill was published solely with a view to the protection of persons liable on the bills, or to the conviction of the offender. Evidence is admissible in such a case, that the party publishing the handbill followed it up by preferring a charge of the same nature against A. B., before a magistrate. *Finden v. Westlake, Gent., One, &c.* 563

LIEN.

See STATUTE OF LIMITATIONS.

1. If A., holding B.'s goods with a lien on them against B., transfer them to C., C. cannot hold them against B. to the extent of A.'s lien under the fifth section of the 6 G. 4, c. 94, unless the transfer be expressly made as a pledge. *Thompson and Another v. Farmer.* 469
2. A mare having been placed with a livery stable keeper, who advanced money to the owner; it was agreed that she should remain as a security for the re-payment of the sum advanced, and for the expenses of her keep: Held, that the stable-keeper had a lien on the mare. *Donatty v. Crowther and Kelly, Sheriffs of London.* 612
3. An agreement by a broker that he will sell goods for his principal, and pay over the whole proceeds, without setting off a debt then due to him from his principal, is not binding upon the broker, so as to deprive him of his legal right of lien or set-off. *M'Gillivray and Others, Assignees of Inglis and Another, Bankrupts, v. Simson.* 584

LORDS' ACT.

A note for the payment of the weekly sixpences under the Lords' Act, signed by the plaintiff's attorney only, is insufficient. *Eagle v. Brown, a prisoner.* 639

MALICIOUS ARREST.

1. The plaintiff was arrested by the endorsee of a bill of exchange, purporting to be drawn on him, and accepted by him. In fact, the acceptance was not his. This is not sufficient to support an action for a malicious arrest, the defendants having acted under a mistake,

without malice. *Spencer v. Jacob and Another.* 501

2. An action for a malicious arrest cannot be maintained where the former cause was terminated by a *stet processus* by the consent of the parties. *Wilkinson v. Howell.* 573

MANDAMUS.

1. *Mandamus* refused to the Trustees of the Rugby Charity to compel the payment of increased alms to claimants on the funds, although the applicants were at an advanced age, and would probably be dead before relief could be had in Chancery. *Ex parte the Trustees of the Rugby Charity.* 589
2. *Mandamus* lies to a minister to restore a parish-clerk removed by him without just cause. And the Court will not judge of the justice of the cause of removal upon the *ex parte* statement of the minister; he must state it in his return to the *mandamus*, and give the clerk an opportunity of answering it. *The King v. The Rev. Samuel Davies, Clerk.* 589

MISNOMER.

1. The defendant's name was Tidmarsh; he was arrested as Tinmarsh:—The Court refused to set aside the writ, but left him to plead. *Homan v. Tidmarsh, sued as Tinmarsh.* 606
2. If the defendant's surname be misstated in a writ, the Court will not set aside the process on motion, but will leave the defendant to his plea in abatement. *Sumner v. Batson, sued by the name of Batley.* 603

MONEY HAD AND RECEIVED.

Articles of agreement provide, that a seaman shall receive for his wages a proportion of the net proceeds of the cargo, after the same are actually received by the owner, subject to certain stipulations as to the seaman's conduct: Semble, that his share may be recovered in an action for money had and received; the owner having received the money, and the seaman having fulfilled the stipulations on his part. *Hayward v. Kain.* 530

MORTGAGE.

Where by a mortgage-deed, the principal sum was advanced by the mortgagee to the mortgagor, for three years from the date of the deed, the interest to be payable quarterly, and the deed contained a proviso that, if default should be made in payment of interest on any of the days appointed for the same, the mortgagee might sell the premises assigned:—the mortgagor having made default in the payment of one quarter's interest, the mortgagee brought ejectment, the Court refused to stay the proceedings on payment of the arrears of interest, and costs, by the mortgagor, as the case did not fall within the provisions of the statute 7 Geo. 2, c. 20, as the principal sum became payable on default of payment of the interest. *Goodtitle on the demise of Harriet Green v. No-tittle.* 616

NOTICE OF ACTION.

See JUSTICES, 1. PLEADING, 4.

NOTICE TO PRODUCE PAPERS.

See EVIDENCE, 1.

NUISANCE.

1. A man carrying on a noxious business in a place where it has been long established, is indictable for a nuisance, if the mischief is increased by the manner or extent in which he carries it on; not otherwise, although the business has increased in amount. *Rex v. Watts and Another.* 521
2. A., the owner of two adjoining houses, grants a lease of one of them to B. He afterwards leases the other to C., there then existing in it certain windows. After this B. accepts a new lease of his house from A.: Held, that B. cannot alter his tenement so as to obstruct windows existing in C.'s house at the time of C.'s lease from A., though the windows are not twenty years old at the time of the alteration. *Coutts v. Gerham.* 548

ORDER OF REMOVAL.

Where an order of removal was made by two justices, one of whom appeared by the order to be one of the churchwardens making the complaint:—Held ill. *The King v. The Inhabitants of Great Yarmouth.* 598

PAROL EVIDENCE.

See EVIDENCE, 16, 26, 29.

PARTICULARS OF DEMAND.

See PRACTICE, 2.

PARTNER.

1. When a partner in trade liable for a sole debt contracted before his partnership, and also liable for partnership debts, pays money to the creditor on account, the creditor cannot apply such payment to the first debt, if the money paid was in fact the money of the partnership. *Thompson and Another v. Brown and Weston.* 466
2. If a person colludes with one partner in a firm to injure the other partners, those others can maintain a joint action against the person so colluding. *Longman and Others v. Pole and Others.* 513
3. A deposit of private deeds by one partner made under a written agreement to secure payments made for him, will cover payments made on behalf of the firm, if there be evidence that the deposit was really made in respect of the partnership debts. *Edward Chuck, Benjamin Wood, and William Deacon, Assignees, &c., of J. C. Starkey, v. Thomas Freen.* 517
4. Persons trading abroad in such mode as to constitute a partnership here, may sue here as partners for consignments sent to this country, though they cannot sue at the place of trading by reason of the particular law of that country. *Shaw v. Harvey.* 578
5. Where a partner borrowed money on his own private account, and subsequently applied part of it to partnership purposes:—Held, that the lender could not sue the partnership for the money so borrowed. *Lloyd and Co. v. Freshfield and Another.* 584

PARTY-WALL.

An account of the expenses of rebuilding a party-wall, delivered in pursuance of the statute 14 Geo. 3, c. 78, s. 41, containing a correct statement of the quantity of brick-work done and materials allowed for, is a

sufficient account, as required by that section, although it also contains a statement of the prices paid for the brick-work and allowed for the materials, which exceed the prices fixed by the statute; and a demand for payment, referring to that account, is sufficient.

The defence relied on, being that the party-wall was not built half on each side of the boundary, as required by s. 14 of the act: Held, that the question for the jury was, whether it were fairly built so, without regarding any minute inaccuracy of measurement, or by unfairly and intentionally encroaching on the defendant's premises? *Reading v. Barnard.* 475

PATENT.

A specification of a patent is to be understood according to the acceptance of practical men at the time of its enrolment. Therefore, when a specification stated that the apparatus mentioned would extract gas "from any substance from which gas capable of being employed for illumination, can be extracted by heat," and the apparatus was not suited to extract gas from oil, it was held that this did not avoid the patent, oil not then being considered fit for the manufacture of gas for lighting towns, though it was then known as a chemical fact that gas might be produced from oil by heat, and this property has been since applied to purposes of illumination. *Crosley v. Beverley.* 522

PAYMENT.

Payment to a person found in a merchant's counting-house, and appearing to be intrusted with the conduct of the business there, is good payment to the merchant, though it turns out that the person was never employed by him. *Barret v. Deere.* 507

PAYMENTS, APPLICATION OF.

See PARTNER, 1.

C. draws a check on his banker, payable to A. and B., assignees of C., or bearer, and writes the name of their banker across it. B., who has another private account with the banker, pays the check into that account: Held, that the bankers are justified in applying it to that account; the drawer's writing the name of the bankers of the payees of the check across it not being, according to the custom of trade, information to the bankers that the money is that of the payees.

Semble, the custom of writing the name of a banker across a check, is only for the purpose of securing that the payment shall be made to some banker, not to the banker originally named, for the holder may substitute another for him; and this even when the name of the particular banker is originally written, not by himself, but by the drawer. *Stewart v. Lee.* 493

PERJURY.

1. A party filing a bill for an injunction, and making an affidavit of matters material to it, is indictable for perjury committed in that affidavit, though no motion is ever made for an injunction. *Rex v. White.* 519
2. In an indictment for perjury, the supposed perjury arose upon evidence given in reply

to the testimony of one of the defendants on the former trial, who was acquitted, and examined as a witness. The indictment did not state his acquittal, nor did the minute of the verdict produced show it: Held, that this was immaterial, parol evidence being given to show that he was in fact examined. *Ree v. Brown*. 495

PILOT ACT.

The master of a vessel having on board a licensed pilot appointed by the Trinity-House of Newcastle-upon-Tyne, under the Local Act, 41 G. 3, c. 86, s. 6, is not entitled to the protection of the 55th section of the General Pilot Act, 6 G. 4, c. 125. *John Dodds and Others v. Richard Embleton*. 584

PLEADING.

See EXECUTOR, 1. SEAMAN.

1. In an action, which had been set down for trial in the term as undefended, and postponed on the condition of having judgment of the term, a plea puis darrein continuance of the defendant's bankruptcy and certificate (the certificate having been obtained since the term) is admissible. *Whitmore v. Banket*. 486
2. The defendants received money to the use of A. and B., assignees of a bankrupt. B. was afterwards removed, and A. became the sole assignee, the money still remaining in the hands of the defendants. He may well declare as for money had and received to his own use as assignee, without mentioning B. at all. *Stewart, Assignee of Payne, v. Lee and Others*. 493
3. A declaration consisted of one special and several general counts. To the special counts there were several special pleas: to the general counts the general issue. The plaintiff entered a nolle prosequi on the special count, and joined issue on the others: Held, that he was entitled to recover on the general counts, though the matters proved might have been given in evidence on the special count and the pleas to it. *Hayward v. Kain*. 530
4. In an action against excise officers for a seizure, the notice of action must be proved in the first instance before any other evidence is given. The plaintiffs slept at different houses, away from their places of business, but a servant slept on the premises of the latter. *Semb.* that the place of business may properly be described in the declaration as a dwelling-house of the plaintiffs. *Quære*, whether the notice of action properly describes the plaintiffs as of the place of business, the statute requiring it to state their place of abode. *Johnson and Another v. Lord and Others*. 562
5. In debt on a bail-bond, the declaration need not contain averments that there was an affidavit of debt, or that the sum sworn to was endorsed on the writ. *Derrington v. Bricknell*. 611
6. The Court refused to set aside a declaration, on the ground of a variance between the writ and declaration—the defendant being called John in the former, and James in the latter. *Garner v. Wheeler*. 612
7. In assumpsit for the breach of an agreement, a clause contained therein, although illegal, as being in restraint of trade, if it

form no part of the consideration, need not be set out in the declaration. *M'Allen v. Churchill*. 614

8. The Court will not allow inconsistent pleas to be pleaded together, unless at the time of the application for leave to plead several matters, an affidavit be made, that such pleas are necessary for the justice of the case. *Shaw v. Russell*. 619
9. In a declaration of *assumpsit* by executors, in a count for money paid to and for the use of the defendant by their testator, B. B., it was alleged, that "the defendants being indebted, he the said B. B. promised to pay the said B. B.:"—Held, that the words "the said B. B." before "promised," might be considered as surplusage. *Buxton and Others, Executors of Buxton, v. Nancoles*. 620
10. To a declaration on a life policy, the Court would not allow the defendant to plead—first, the general issue; secondly, a fraudulent misrepresentation, as to the state of health of the party whose life was insured; and lastly, that the policy was not under seal. *Weld v. Foster*. 631
11. The plaintiff declared in *assumpsit* as assignee of a bankrupt, for goods sold and delivered to the defendant by the bankrupt, before his bankruptcy:—Held, that a plea, alleging that on an account stated between the defendant and the bankrupt before his bankruptcy, the former gave his bill of exchange to the latter, and was still liable to him thereon, was bad upon general demurrer. *Rolt, Assignee of Welsford, a Bankrupt, v. Watson*. 634
12. In an action of covenant on a charter-party, the defendant pleaded several special pleas, to some of which the plaintiff demurred, and, after argument, obtained judgment:—Held, that the defendant could not afterwards file additional pleas, although it was sworn that facts had come to his knowledge, material for defence, since the argument on demurrer, and with which facts he was then unacquainted. *Munnings v. Lenox*. 635

POOR RATE.

1. A lighthouse erected on the shore for conveying light to ships at sea, is not rateable in respect of the value of the tolls paid by the ship-owners for the benefit so communicated; but simply as a building. *The King v. William Fowke, Esq.* 588
2. Trustees are not rateable to the poor in respect of the tolls of a navigation received by them, the surplus of which is by statute made applicable to the repair of public bridges and highways. *The King v. The Trustees of the River Weaver*. 600

PRACTICE.

See ATTORNEY, 3. BILLS OF EXCHANGE, 11. DISTRESS, 3. EJECTMENT, 2. PLEADING, 1. TRESPASS, 5.

1. Where the counsel for the defendant opens facts to the jury, and calls no witness to prove them, it is in the discretion of the Judge to allow the plaintiff's counsel to reply. *Crerar v. Sodo*. 478
2. If a defendant prove payment to a plaintiff, by showing the particulars of demand, delivered under a Judge's order, in which the plaintiff has credited the defendant, this is

- the evidence of the defendant, and entitles the plaintiff to reply. *Rymer v. Cook*. 479
3. The counsel for the plaintiff has a right on the cause being called on to have a witness called on his subpoena without swearing the jury. *Hopper v. Smith*. 486
 4. In an action to recover the deposit on the purchase of an estate on the ground of a defect in the vendor's title, specified on rescinding the contract, no objection can be insisted on at the trial which was not stated as a reason for refusing to complete the contract, if it be of such a nature that it might, if then stated, have been removed. *Todd v. Hoggart*. 488
 5. In ejectment, where each party claimed as heir at law, and the real question was as to the legitimacy of the defendant, who was clearly heir if legitimate; he proposed to admit that unless he were legitimate, the lessor of the plaintiff was the heir at law: Held that this admission did not give him the right of beginning. *Doe v. Bray*. 497
 6. The bail to the sheriff cannot put in bail to the action before the return of the process, without the consent of the defendant. *Birt v. Roberts*. 501
 7. The judge at Nisi Prius cannot certify under the statute 5 G. 4, c. 106, § 21 (Welch Judicature Act), unless the plaintiff prove that the defendant was in Wales at the time of the service of process. *Jones v. Kenrick*. 501
 8. Where a party tendered evidence *prima facie* admissible: Held, that the other party ought not to be allowed to interpose with the evidence for the purpose of excluding it: but that it should be received, and expunged if afterwards shown not to be properly receivable. *Jones v. Fort*. 506
 9. In trespass for entering plaintiff's dwelling-house and taking his goods on a plea justifying the trespass by proceedings under a commission of bankruptcy, and replication taking issue on the act of bankruptcy, the defendant is entitled to begin. *Colton v. James*. 520
 10. An order was obtained for delivery of particulars of set-off within a fortnight: they were not delivered for five weeks, but after the delivery an order was made by consent for the amendment of the declaration.
This is a waiver of the irregularity in the delivery of the particulars. *Wallis v. Anderson*. 523
 11. The nisi prius record of a cause, with the minute of the verdict endorsed by the officer of the Court on the jury panel, is good evidence that the cause came on for trial, though no regular *postea* is endorsed. *Rex v. Browne*. 495
 12. Where a witness remains in court after an order for the witnesses to withdraw, the judge may still allow him to be examined, subject to observation on his conduct in disobeying the order. *R. v. Colley*. 537
 13. When the Attorney-General or King's counsel appears officially as such to conduct a prosecution on an indictment for misdemeanour, he is entitled to reply though the defendant calls no witnesses. *Rex v. Marsden*. 562
 14. Proof of a conversation with the defendant in the cause, referring to the matters involved in it, taking place after the writ is sued out, will satisfy an undertaking to give material evidence in the county where the conversation took place. *Gosling v. Birnie*. 579
 15. In ejectment by the heir at law, the defendant is not entitled to begin by admitting the heirship and seisin of the ancestor unless defeated by a conveyance made by the ancestor under which the defendant claims. To entitle the defendants to begin, the plaintiff's whole *prima facie* case must be admitted. *Doe v. Tucker*. 580
 16. Process being returnable in Easter, plaintiff, in Trinity term, files common bail for defendant, and delivers a declaration with notice to plead. In Trinity vacation, judgment is signed for want of plea:—Held, that defendant was not entitled to an imparlance until Michaelmas term, for this rule only applies where the defendant himself is properly in Court before the declaration is delivered. *Winter v. Barnes*. 583
 17. A motion for an attachment against a person subpoenaed as a witness, for not attending a trial, must be made within the Term succeeding the trial, and a copy of such subpoena must be delivered personally at the time of service. *Thorpe v. Gisbourne*. 605
 18. A writ of entry was returnable, and an appearance entered thereon, in Michaelmas Term. The count was entitled of Hilary Term, and was delivered on the 10th February. The Court set aside the count, for irregularity, and refused to allow it to be amended. *Rowles, D., Lawrence, T.* 607
 19. Plaintiff may proceed by *distringas* to compel the appearance of a defendant who resides abroad, but carries on trade in this country. *Hornby v. Bowling*. 610
 20. The court will not allow the venue to be changed after plea pleaded, unless the justice of the case clearly requires it. *Bailey v. Beaumont*. 611
 21. In an action by a clergyman against a farmer, for improperly setting out his tithes, the jury found a verdict for the defendant, contrary to the opinion of the Judge. The Court directed a new trial; and anonymous letters having been inserted in the newspapers of the county where the cause was tried, reflecting on the character of the plaintiff, as a clergyman:—the Court ordered the venue to be changed to a third county. *Walker v. Ridgway*. 615
 22. A plaintiff will not be allowed his expenses in the construction of a model, nor a compensation for loss of time to scientific persons, who had been sent to a distant part of the country to inspect a building there, although he could not *scilicet* have proceeded to trial without their testimony. *Bayley v. Beaumont*. 618
 23. Where the defendant had, before declaration delivered, tendered a sum of money in discharge of debt and costs, but the plaintiff declined to accept it, the Court refused to grant a rule, that, upon payment of such debt and costs by the defendant into Court, and upon the same being taken out by the plaintiffs, the subsequent costs should be paid by them; as their conduct did not appear vexatious or oppressive. *Hatchard v. Flague*. 633
 24. The defendant, a travelling showman, having been duly served with process, referred the plaintiff's attorney to a certain house in London, where he stated he should be on a given day; the notice of declaration was left there accordingly, but the person who left it was informed at the time, that the defendant did not reside, but occasionally called at the house, and that it was not known where he then was.—Held, not to be sufficient.

ment service of the notice. *Hyde v. Wombwell*. 635

25. Where, by a Judge's order, the defendant had a week's time to put in bail:—Held, that an attachment could not be moved against the Sheriff, for not bringing in the body, until such order was discharged. *Rowe v. Harvey*. 639

26. Where, in an action of assumpsit upon a special agreement, the declaration and the issue varied from the record, (which corresponded with the agreement,) as to the description and price of certain goods mentioned in the agreement:—The Court refused to set aside the verdict, which had been found for the plaintiff, on the ground of their variance, as it might have been amended at the trial. *Berney v. Green*. 639

27. In an action against a sheriff for an escape, the Court refused to allow the venue to be changed to the county in which the escape took place, although it was sworn that all the witnesses resided there. *Jenkins v. Lawrence*. 642

28. A rule for an attachment against the chief bailiff of a liberty, for not bringing in the body, was obtained on the 12th February, and the attachment not sued out until the 19th May following, and in the interim one of the defendants in the original action obtained his discharge under the Insolvent Debtors' Act:—The Court set aside the attachment. *Rex v. Jewson*. 644

29. The Court refused to set aside the service of a writ of attachment of privilege, on the ground that a wrong year was stated in the English notice. *Harmer v. Lane*. 647

PRIMAGE.

In cases where primage is payable by the consignee of the cargo to the master of a ship, the master may maintain an action for it, though the freight has been separately adjusted.

Where the bill of lading expressed that the goods were to be delivered to the consignee, "he paying freight for the same as per charter-party, with primage and average accustomed:" Held, that the master was entitled to receive primage from the consignee: although the contract between the ship-owner and the agents of the consignee (there being no charter-party) was for 5*l.* per ton freight, and did not notice primage; and although the master contracted with the ship-owner to receive a sum certain "in lieu of all cabin and other allowances, to commence from the day of victualling the ship, and for which he is to mess the officers." *Best v. Saunders*. 511

PRINCIPAL AND ACCESSARY.

On an indictment against principal and accessories, the case against the principal was proved by the testimony of an accomplice, who was confirmed as to the accessories, but not as to the principal: the jury were directed to acquit the prisoners. *Rex v. Wells*. 536

PRINCIPAL AND AGENT.

See PAYMENT.

1. If a deed be produced, purporting to bind a trading company, proof that the person executing it was their general law agent is

prima facie sufficient, without showing that he was authorized to execute the particular deed. *Doe dem. Macleod v. East London Waterworks Company*. 490

2. A party employing another to present a bill for acceptance, is entitled to recover nominal damages against such agent, if he fails to present it, although no real damage whatever is occasioned by the neglect, the bill and costs having been paid by other persons liable on it. *Van Wart v. Woolley*. 535

3. Where cattle had been sold by the plaintiff to A., and it appeared that at the time of sale A. managed the defendant's farm, that he had always his money in hand, and that he had then to the credit of his account more than the value of the cattle, that the defendant had never authorized him to buy on credit, that he had sometimes bought for the defendant and sometimes for himself, that the cattle had been paid for by bills drawn on A. which had been dishonoured when due, and afterwards renewed by the plaintiff:—Held, that it was sufficient to leave it to the jury to say whether the cattle had been sold on the credit of the defendant or of A., and it was not necessary that it should be left to them to say, whether the plaintiff, at the time of the sale, was aware that A. was acting as the agent of the defendant. *Edwards v. Smith*. 630

PROMISSORY NOTES.

See BILLS OF EXCHANGE.

REVERSIONER.

See ACTION ON THE CASE, 3.

SEAMAN.

A sailor serving under articles providing for a forfeiture of his wages in case of breach of any of his engagements, among which is that of serving faithfully during the voyage, can recover nothing if he is left ashore in the course of it owing to his own fault in being absent, though he had no intention of deserting.

He is left on shore by his own fault, if he is so in consequence of going away, after being forbidden by the captain, though he subsequently obtains the leave of an inferior officer.

This defence may be proved on a plea of nil debet. *Sherman v. Bennett*. 571

SEDUCTION.

In an action by a father for seduction, it is not necessary to show any acts of service done by the daughter: it is enough that she lived in the father's family under such circumstances that he had a right to her services. *Maunder v. Venn*. 535

SET-OFF.

See LIEN, 3.

SHERIFF.

See SHERIFF'S OFFICER.

The newsheriff is not answerable for the escape of a debtor taken in execution in the time of his predecessor, and not delivered over to him by indenture. *Davidson v. Seymour*. 465

SHERIFF'S OFFICER.

An action for money paid to the use of the defendant may be maintained by a sheriff's officer who has paid the debt and costs on attachment against the sheriff, bail above not having been put in through the misconduct of the defendant in imposing insufficient bail on the sheriff, and the defendant not having promised to indemnify the officer both before, and after the payment: but the officer cannot recover beyond the debt. *White v. Leroux*. 541

SHIP.

It is the rule of the sea, that a vessel sailing before or with the wind, should make way for one that is sailing by or against it: therefore, where, in an action on the case for running down the plaintiffs' brig, it was proved that the defendants' vessel was sailing in the Channel before the wind, having her studding sails set, at night, and that the plaintiffs' brig was sailing by the wind; and the jury found a verdict for the defendants; the Court granted a new trial on payment of costs, for the purpose of further investigating the facts, as there was some doubt as to the propriety of carrying studding sails at such a time and in such a place; and also, as to whether the defendants' captain had kept a proper look out. *Jameson v. Drinkald*. 636

SLANDER.

1. In an action for words, not actionable in themselves, evidence of their truth may be given under the general issue, to disprove malice. The attorney of a party claiming title to premises put up for sale, is not liable to an action for slander of title, if he bona fide, though without authority, makes such objections to the seller's title, as his principal would have been authorized in making. *Watson v. Reynolds*. 457
2. In slander, the declaration stated, that the plaintiff was an auctioneer and appraiser, that the defendant had employed him as an appraiser to value certain goods, and that he spoke of him, and his conduct as to such valuation—"He is a damned rascal; he has cheated me out of 100*l*. on the valuation:"—Held sufficient after verdict. *Bryant v. Loxton*. 608

STAMP.

A bond, conditioned for the due discharge by A. M. of the duties of clerk, provided that such discharge should be ascertained by the inspection of A. M.'s accounts by J. S.; and that the amount so ascertained should be liquidated damages. A paper by which J. S. has ascertained such amount, requires to be stamped as an award. *Jebb v. McKiernan*. 541

And See *Wick v. Hodgson*, page 642, and *Leykariff v. Ashford*. 643

STATUTE OF LIMITATIONS.

1. Evidence of a parol promise will not take a case out of the statute of limitations, in a cause tried after Jan. 1, 1829, though at issue before that day. *Hilliard v. Lenard*. 526
2. When one of two joint executors was applied to for payment of a debt of his testator's, who had been dead 20 years, and as against whom the debt was barred by the Statute of Limitations, and said, "I believe

the debt is a just one, and has never been paid. I should be happy to serve you in the matter if I could, but I cannot do anything without the consent of the (testator's) family:"—Held, in an action against both the executors, that there was no such acknowledgment of the debt, as took the case out of the Statute of Limitations, as against them; there being no promise, expressed or implied, to pay the debt. *M' Culloch v. Dawes*. 587

3. Where, after the lapse of six years, a defendant, being asked for the payment of a debt, said, "I owed the money, but I have a receipt in full of all demands, I shall search for it, and let you know in the event of my not being able to find it:"—Held, that this was not sufficient to take the case out of the statute of limitations. *Brydges v. Plumtre*. 599
4. On a plea of the statute of limitations—Held, that a new promise *infra sex annos* need not be declared on specially, although made thirteen years after the accrual of the original cause of action. *Upton v. Else*. 643
5. To take a case out of the statute of limitations, evidence of conversations, in which one of the defendants had admitted the debt, and said—"that it was hard that he should be called upon individually to pay the debts of the firm, when so many outstanding debts due to them were uncollected; that he had put the debts into the hands of an accountant, who would settle the business; and that he might refuse to pay altogether, but would not act in that way"—was held sufficient to constitute an absolute promise to pay. *Pierce v. Brewster*. 644

TOLL.

See EVIDENCE, 27.

A canal act is not rendered a public act by containing provisions empowering the company to regulate and take tonnage, rates, and tolls, from persons using the canal.

It is not a sufficient consideration for a toll thorough claimed for passing on all roads within a town, that the party claiming it has repaired one road, a wharf, and a bridge. Where the king, before the time of legal memory, was entitled to the soil of the town of C. and to toll traverse within it, and afterwards granted to the burgesses of the town, "the town of C. with all its appurtenances;" these words are sufficient to pass the toll. *Brett v. Beales*. 553

TRESPASS.

1. A stack of chimneys belonging to a house close to a highway, which, by reason of a fire, were in immediate danger of falling on the highway, were thrown down by some firemen. Held, that they were justified in so doing, and were not answerable for damages unavoidably done to an adjoining house of a third person. *Dewey v. White*. 470
2. The commander of an English merchant ship lying in a port of a foreign state, sent a seaman, who had committed mutiny on board the ship, ashore, in custody of the soldiers of the port, and procured him to be flogged and imprisoned by the local authorities: Held, that the captain was answerable in trespass for what was done on shore, he having taken an active part in instigating

and promoting the proceedings. *Aitken v. Badwell.* 475

3. The person giving another in charge for a felony, and assisting a constable in the arrest, is not entitled to an acquittal on the general issue in trespass brought against him, together with the constable. *Hough v. Marchant.* 574

4. In trespass *quare clausum fregit*, with a plea of *liberum tenementum*, proof that both parties have a close of the same name will not prevent the plaintiff from recovering without a new assignment. *Cocks v. Jackson.* 595

5. Trespass for breaking open the outer-door of the plaintiff's dwelling-house, and entering therein, &c. Plea, justifying the entry, generally, under a pluries *fi. fa.*

Demurrer, assigning for cause that in the plea it was not averred that the outer-door was open at the time the defendants entered under the writ:—Held, that the plea was bad. *Buckenham v. Francis.* 604

USE AND OCCUPATION.

A person having title to land sued for use and occupation against A., who had received possession from a third person: Held, that the declaration of A., "I don't consider the land as yours, but prove the right, and I'll pay you rent," would not support assumpsit for use and occupation. *Chipp v. Blank.* 594

USURY.

See **BILLS OF EXCHANGE**, 5.

1. It is usurious for the discount of a bill to engage with the holder that he shall pay to the agent procuring the discount a premium, though he himself retains only the legal discount. *Megee v. Simmons.* 486
2. A pawnbroker received a parcel of goods on one day, and on that and several subsequent days he advanced sums of money, each not exceeding 10*l.*, as on different parts of the parcel, and received pawnbroker's interest of three-pence in the pound per month on those sums: Held, that it was a question for the jury whether this really were one transaction, and a mere ontrivance for obtaining the higher interest on the whole sum, in which case it is void, or whether the advances were really distinct. *Cowie v. Harris.* 490

VARIANCE.

See **PLEADING**, 6. **PRACTICE**, 26.

VENDOR AND VENDEE.

See **BILLS OF EXCHANGE**, 13. **EVIDENCE**, 4.

VENUE.

See **PRACTICE**, 20, 21, 27.

WAGER.

An action to recover the deposit as a bet on a wrestling match ought not to be tried, though the match had gone off, and the defendant, a stakeholder, had promised to repay the money. *Kennedy v. Gad.* 513

WAIVER.

Land was demised to the defendants, who covenanted in the lease to build and complete certain houses thereon, within a year;

and that, if they did not, the lease should be void. The houses not being completed within the specified period:—Held, that the forfeiture was not waived by the steward of the lessor having permitted the defendant to employ workmen in completing the houses, for a short period after such forfeiture. *Dee v. Brayley.* 625

WARRANT OF ATTORNEY.

The statute 3 G. 4, c. 39, s. 2 (as to the filing warrants of attorney to render the judgments entered on them effectual against subsequent commissions of bankruptcy), is not repealed by the statute 6 Geo. 4, c. 16, s. 81.

Quere whether the stat. 3 Geo. 4, c. 39, s. 2, extends to cases where there has been no act of bankruptcy at the time of giving the warrant of attorney. *Wilson v. Whitaker.* 459

WHALE FISHERY.

By the custom of the Greenland Whale Fishery, the first striker is entitled to the fish, though his harpoon be detached from the line when the second striker strikes, if the fish be so entangled in his line that he might probably have secured her without the interference of the second striker.

If while the fish is fast to the harpoon of the first striker, another comes up unsolicited and so disturbs the fish that she breaks from the first harpoon, and then he strikes her with a harpoon himself and secures her, the fish continues the property of the first striker. *Hogarth v. Jackson.* 471

WINDOWS.

See **ANCIENT LIGHTS**.

WITNESS.

See **BILLS OF EXCHANGE**, 6. **EVIDENCE**, 32. **PRACTICE**, 12, 17.

1. If a witness answers any questions on a matter rendering himself liable to forfeiture or punishment, he cannot afterwards claim his privilege, but must answer throughout.

The counsel in a cause have no right to object, in favour of a witness, that the answer to a particular question renders him liable to punishment or forfeiture. Such objection belongs to the witness only. *East v. Chapman.* 468

2. A witness is not excused from answering a question on the ground that the conduct inquired into on his part would subject him to a penalty, if the time limited for proceeding for such penalty is past. *Roberts v. Allatt.* 505

3. A communication made to an attorney or counsel is not privileged unless made with a view to a judicial proceeding either commenced or apprehended. *Broad v. Pitt.* 515

4. Where notice to produce a letter has been served, the attorney for the opposite party may be asked, whether he has that letter, in order to let in secondary evidence of it, if not produced. *Bevan v. Waters.* 515

5. In an action by the assignees of a bankrupt, the bankrupt is not rendered competent unless his certificate and release are produced, or the non-production of them is accounted for. *Goodhay v. Hendry.* 533

6. In assumpsit, where one defendant pleads a plea operating only in his personal discharge,

- a verdict may be taken for him on that plea, and he may then be examined as a witness for his co-defendants.
- Quære, whether in an action of contract against several defendants, some of whom plead matter negating the action with respect to all, and the other pleads his bankruptcy only, on which the jury find a verdict for him, he is a competent witness, after that verdict returned, to prove the plea of the other defendants. *Bate v. Russell.* 538
7. On a plea of plene administravit to an action against an administratrix, an unsatisfied creditor of the intestate is a competent witness for the defendant. *Davies v. Davies.* 531
8. An indictment for the non-repair of a road or bridge on a liability *ratione tenuræ*, cannot be sustained where it appears that the tenement on which the liability is charged originated within time of legal memory. On such an indictment parishioners are admissible witnesses for the prosecution.
- The inhabitants of a parish are admissible witnesses in an action by the surveyor of the highways against his predecessor for penalties for not accounting, and for the balance of moneys in his hands. *Rex v. Hayman.* 550
9. The attorney conducting a cause in court may be called as a witness by the opposite side, and asked who employs him, in order to show the real party, and so let in his declarations. *Levy v. Pope.* 552
10. Several persons having agreed to bear equally the expenses of a joint undertaking, in an action brought against one of them, another of the contractors is a competent witness for the defendant if released by him, though the rest do not join in the release. *Duke v. Pownall.* 558
11. In order to discredit a witness by proof of a contradictory statement, it is not enough to ask him generally whether he has ever made such a statement, but particulars must be specified to him. *Angus v. Smith.* 567
12. In an action of assumpsit for goods sold and delivered, it appeared that the goods were sold by the plaintiff to A., who gave promissory notes for their value, which were dishonoured, and A. afterwards became insolvent; it appeared also that A. was in partnership with the defendants, and it was proposed to call him as a witness for the plaintiff, but his evidence was objected to by the defendants, without a release from them, and was rejected:—Held that A.'s evidence was properly rejected, on the ground of his being interested in procuring a verdict against the defendants, as in that case he would only be liable for a proportion of the debt. *Ripley v. Thompson.* 628



